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No. 98-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CHARLES SIMPSON CHRISTOPHER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the approval of state regulators to conduct a private business constitutes a "property" interest such that a scheme to defraud regulators of this interest violates the federal wire fraud statute?

II. Whether this Court's opinion in *McNally v. United States*, 483 U.S. 350 (1987) limiting federal mail fraud prosecutions to schemes to defraud persons of property requires the government to prove that the person allegedly deceived was the person potentially economically injured?

III. Whether the giving of a general instruction on mens rea in a fraud case precludes the defense from obtaining an instruction on good faith reliance upon the advice of counsel?

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OPINIONS BELOW

The opinion of the First Circuit Court of Appeals below is reported as *United States v. Charles S. Christopher*, 142 F.3d 46 (1st Cir. 1998). App. 1a-25a.[1]

JURISDICTION OF THE COURT

The judgment below was entered and filed on April 27, 1998, and rehearing was denied on June 11, 1998. App. 38a. Accordingly this Court has jurisdiction to issue the writ of certiorari under 28 U.S.C. § 1254.

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[1] Citations to the appendices are designated as "App. ___." Designations to the trial transcript are by date and page. Designations to defense exhibits are to "CC __."

STATUTORY PROVISION AT ISSUE

18 U.S.C. § 1343
(wire fraud statute)

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF FACTS

Petitioner Charles S. Christopher was convicted of eleven counts of wire fraud and ten related counts of interstate transportation of fraud proceeds based upon the government's contention that Christopher deceived state insurance regulators in 1988 when a company of which he was President, Resolute Holdings, Inc. ("Resolute"), sought regulatory approval for the acquisition of two insurance companies, Diamond Benefits Life Insurance Company ("Diamond") and American Universal Insurance Company ("American"). App. 2a. According to the prosecution, Christopher deceived state regulators when, during the regulatory approval process, he misrepresented that all liens would be paid prior to the acquisition closing upon the real estate collateral used to secure Resolute's contribution of new capital to the struggling insurance companies. *Id.* Further, the prosecution contended that Resolute's use of monies procured from the insurance companies to pay off these pre-existing liens, and to pay off the purchase price of Diamond, violated promises by Christopher to these state insurance regulators or specific state regulatory orders prohibiting such conduct.

Diamond was domiciled in Arizona and its acquisition by Resolute was subject to the approval of insurance regulators from Arizona and California. App. 2a. American was domiciled in Rhode Island, and its acquisition by Resolute was subject to the approval of Rhode Island insurance regulators. Id. Resolute's plan for the acquisition of Diamond and American insurance companies, as designed, approved, and implemented, called for Resolute to contribute, apart from the purchase prices, more than $100 million in new capital into the two companies in the form of promissory notes which would be secured by substantial real estate holdings. The collateral used to secure the promissory note for the American acquisition included the development properties known as Indian Palms and Heritage Ranch, while the collateral used to secure the promissory note for the Diamond acquisition was known as Indian Springs. July 10, 1995, at 9-10. This collateral was owned by companies which were owned by Resolute's majority shareholder, defendant Wayne Reeder.[2]

The properties which secured these promissory notes were encumbered with certain substantial pre-existing liens. According to the prosecution, Christopher falsely promised the Arizona and Rhode Island insurance regulators that Resolute would have these pre-existing liens paid off in full at the time of its closing on the acquisition of each company. App. 4a. The prosecution contended that these regulators detrimentally relied upon these promises or conditions in order to approve of Resolute's acquisition of Diamond and American. After the May 27, 1988 conditional closing on the American acquisition and the June 14, 1988 closing on the Diamond acquisition, Resolute authorized its new subsidiaries to issue loans in June and July 1988 for the express purpose of paying off these liens.

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[2] Mr. Reeder's trial was severed from petitioner's for medical reasons.

More specifically, Diamond issued a secured and recorded $18 million loan to Hilltop Corporation, a Reeder-related company, for the express and limited purpose of paying off liens. (CC 501). This loan was secured by new real estate collateral known as the Windbrook Country Club, and was guaranteed by Hilltop, a company with a net worth of $34 million. July 10, 1995, at 95, 228-30. Based upon this recorded loan, monies received by Diamond were disbursed as loan proceeds in the latter part of June 1988 to pay off pre-existing liens on properties used to secure the Resolute promissory note for the acquisition of American.

In July 1998, a similar, but smaller, collateralized loan was issued by American to Mydar Corporation, and a Reeder corporation sold American real estate and related notes known as Desert Aire. Again, the loan and sale proceeds were used to pay off pre-existing liens on the properties used to secure the Resolute promissory note for the Diamond acquisition.

Resolute employed the services of respected regulatory counsel in Arizona, California, and Rhode Island throughout the acquisition process, as well as other law firms in California and Texas. July 10, 1995, at 12-14, 19-20, 108; CC551, CC358. In July 1998, however, counsel for Resolute informed petitioner that the earlier Diamond loan to Hilltop (which counsel had drafted and ostensibly negotiated a waiver upon) may have run afoul of Arizona regulatory limitations on loans to one borrower, and he recommended that it be restructured. July 11, 1995, at 120-21. The Windbrook loan (which had accrued interest) was then restructured in July 1988 with the original note being replaced with a combination of investments and the purchase of a Reeder property known as Florence Gardens. This restructured transaction was then disclosed both orally and in writing to Arizona regulators in August 1988 by counsel who represented to the regulators that the final

transaction complied fully with Arizona and California regulatory requirements. CC 675.

The prosecution contended that petitioner Christopher deceived the insurance regulators into believing that all of the collateral liens would be paid off prior to the acquisition closing, and that the regulator's approval of the acquisition was the product of this deception. Hence, the government argued successfully below that the insurance regulators had a property interest in the regulatory approval process such that petitioner's alleged deception deprived the regulators of that property interest.

Christopher contended below that neither he nor Resolute violated any applicable state insurance regulation or order, that every action taken by Resolute was undertaken in reliance upon the advice of competent regulatory counsel, and that the summer 1988 wire transfers at issue were based upon prior binding and secured loan agreements by Diamond or property purchases by American.[3] Mr. Christopher's status as President of Resolute lasted only 84 days during the summer of 1988, and he left Resolute's employ in early September 1988. The jury was presented with limited evidence that the two insurance companies went into receiverships for unspecified reasons, after Christopher's departure. The trial court precluded the defense from introducing any evidence as to the reasons, timing, or circumstances of these receiverships. July 10, 1995, at 161-63 (sustaining government objection to receivership evidence on ground that collateral to case). Thus, for example, the trial record contains no evidence that Resolute

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[3] The acquisition of American took place in a "conditional closing" on May 27, 1988 while the Diamond closing took place on June 14, 1988. The wire disbursements at issue in this case took place from June 15th through July 22nd.

failed to perform any contractual or other non-regulatory obligation it assumed during the acquisition process, or that any insurance company was financially harmed by their acquisition by Resolute and its substantial net capital contributions.[4] Christopher also contended, in a motion for a new trial, that his alleged misrepresentations to state insurance regulators did not state a wire fraud offense under this Court's holding in *McNally v. United States*, 483 U.S. 350 (1987) because the allegedly deceived party (the insurance regulators) did not, and could not, suffer any economic loss as a result of Christopher's alleged scheme to defraud them. Citing caselaw from a number of circuits, Christopher contended that the state insurance regulators had merely a regulatory interest in accurate information for purposes of the acquisition approval process--a matter as to which state law may speak--but which is insufficient, under *McNally*, to fulfill the necessary "property" objective of a federal scheme to defraud under the federal wire fraud statute, 18 U.S.C. § 1343. Second, Christopher asserted that, under *McNally*, there must be a convergence between the person deceived and the person potentially subject to economic injury, and that this requirement was not satisfied here because the allegedly deceived regulators were not potentially subject to economic injury. The District Court rejected both contentions.

Specifically, the District Court ruled that the property interest at issue in this fraud case was "formal state approval of a sale," and because of Christopher's deception "the insurance regulators were deprived of their right to effectively control the granting of approval and subsequent supervision." App. 30a, 32a. Further, the District Court held that the public had a

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[4] At sentencing, the government adduced evidence, which was credited by the District Court for purposes of calculating loss, that defendant Christopher's conduct caused the insolvency of Diamond.

protectible property interest in effective regulation such that, "when an insurance regulator is deceived, the public is effectively deprived of its right to that expected protection." App. 33a.

The District Court also refused to give a requested defense instruction on good faith reliance upon the advice of counsel. App. 40a. The trial record contained a plethora of evidence that Resolute retained the services of several law firms in California, Arizona, Texas, and Rhode Island for purposes of providing regulatory counsel during the acquisition process, and that Christopher received legal advice, including formal legal opinions, that the transactions at issue complied with all regulatory requirements. (CC480, 501, 507,557, 591, 675; July 10, 1995 testimony, at 119-21, 127.) Indeed, Christopher introduced evidence that the loan transactions with Diamond were restructured shortly after their funding at the recommendation of counsel solely in order to comply with Arizona insurance regulatory requirements on such loans, although the Indictment alleged that this restructuring was for fraudulent purposes. Redacted Indictment, ¶ 35. Moreover, the transactions themselves were documented by Resolute's lawyers, and Christopher introduced evidence that, in advance of each transaction, Christopher made full disclosure to counsel, and counsel opined that the transactions were in compliance with applicable regulatory requirements.

Upon appeal, the First Circuit affirmed Christopher's convictions. Noting that the issue of whether *McNally* requires convergence between the person deceived and the person injured is "an issue that has generated a split of authority," the First Circuit held that such convergence was unnecessary. App. 13a (comparing *United States v. Blumeyer*, 114 F.3d 758, 767-68 (8th Cir. 1997), *cert. denied*, 516 U.S. 1172 (1996) with *United States v. Lew*, 875 F.2d 219, 221-22 (9th Cir. 1989). On

appeal, the government asserted that it had established a property loss because the insurance regulators, by virtue of the approval statutes requiring approval for acquisitions, were "in essence statutorily-appointed agents for Diamond, American, and their policyholders." Government Brief, at 30. According to the government, the "defrauding of the regulators must therefore be considered a constructive defrauding of the companies and the policyholders themselves." *Id.* (citing *Blumeyer*). The First Circuit agreed, finding that Christopher was accused of "subverting requirements imposed by state insurance regulators designed to protect the financial health" of the insurance companies and that petitioners misrepresentations were directed at "funds the regulators sought to protect," thereby satisfying the property requirement for a mail fraud conviction. App.17a.

The First Circuit also affirmed the District Court's refusal to give an advice of counsel instruction on the broad ground that such an instruction is unnecessary because the District Court gave a jury instruction on intent. App. 19a. In so holding, the First Circuit ruled that a defendant is not entitled to an advice of counsel defense instruction in any case in which the jury is otherwise instructed that the defendant must "knowingly" commit an offense. App. 19a.

ARGUMENT

I. A substantial split of authority exists as to whether the federal fraud statutes are applicable to alleged fraudulent schemes to obtain regulatory approvals to conduct private businesses.

In the *McNally* case, this Court construed the scheme to defraud element of the mail fraud statute "as limited in scope to the protection of property rights." *McNally*, 483 U.S. at 360, and this holding was reaffirmed by this Court in *Carpenter v.*

United States, 484 U.S. 19, 25 (1987). In the aftermath of *McNally*, federal courts have grappled with government contentions that the objects of alleged schemes to defraud constitute "property" within the meaning of *McNally*. In particular, many circuit courts have concluded that government approval to conduct a business "represents nothing more than an 'expression of the government's regulatory imprimatur.'" *United States v. Schotts*, 145 F.3d 1289, 1293 (11th Cir. 1998) (quoting *United States v. Schwartz*, 924 F.2d 410, 418 (2d Cir. 1991)). As a result, several circuits have concluded that "the government's regulatory interests are not protected by the mail fraud statute." *United States v. F.J. Vollner & Co.*, 1 F.3d 1511, 1521 (7th Cir. 1993). *Accord, Corcoran v. American Plan Co.*, 886 F.2d 16, 21-22 (2d Cir. 1989) (deception of state insurance regulators did not state mail fraud offense because policy holders did not have property interest in effective regulation of insurance company).

As the Eleventh Circuit recently observed in *United States v. Schotts*, 145 F.3d 1289 (11th Cir. 1998), while the majority of circuits have held that a business license is not property and therefore cannot support a mail fraud conviction,[5] some circuits

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[5] *Schott*, 145 F.3d at 1293 (citing the following as within majority of circuits holding that a business license is not property, *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991) (export license); *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990) (school bus driver permits) *cert. denied*, 500 U.S. 921 (1990); *Toulabi v. United States*, 875 F.2d 122 (7th Cir. 1989) (taxi operator license); *United States v. Kato*, 878 F.2d 267 (9th Cir. 1989) (pilot license); *United States v. Murphy*, 836 F.2d 248 (6th Cir. 1988) (bingo game license) *cert. denied*, 488 U.S. 924 (1988).

have held to the contrary,[6] and this "division among the circuits is not surprising because neither *McNally* nor *Carpenter* define the 'property protected by the mail fraud statute." 145 F.3d at 1293. Instead, this Court has informed lower courts that the term property should be interpreted broadly, but not broadly enough to include "intangible rights." *Schotts*, 145 F.3d at 1293 (quoting *McNally*, 483 U.S. at 356; *Carpenter*, 484 U.S. at 25).

This Court should grant review of this case to address the issue which has sharply divided the circuits since this Court's *McNally* opinion in 1987--does a governmental interest in regulating who may conduct a private business confer a property right upon the government which may be vindicated by a criminal prosecution under the mail or wire fraud statutes? Here, the only conceivable government property interest at stake was that of the state regulators to approve a private sale of an insurance company--that is, a purely regulatory interest unadorned by any financial interest of the state regulatory agencies. Further, the undeniable fact that governments, both state and federal, are increasingly in the business of regulating who may undertake or continue private businesses, virtually assures that this will be a recurring issue as to which uniform treatment by the federal courts is preferable.

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[6] *Schott*, 145 F.3d at 1293 (citing the following as within minority of circuits holding that a business license is property, *United States v. Salvatore*, 110 F.3d 1131, 1140 (5th Cir. 1997) *rehearing denied*, 117 F.3d 1419, *cert. denied* 118 S. Ct. 441 (1997) (video poker license); *United States v. Bucuvalis*, 970 F.2d 937 (1st Cir. 1992) (liquor license) *cert. denied*, 507 U.S. 959 (1993); *United States v. Martinez*, 905 F.2d 7098 (3d Cir. 1990) (medical license) *cert. denied* 498 U.S. 1017 (1990)).

II. A split of circuit authority exists as to whether the federal fraud statutes apply to the alleged deception of those who cannot suffer economic injury, and this recurring issue warrants the review of this Court.

A number of federal courts have construed this Court's *McNally* opinion as logically requiring that the object of a scheme to defraud must be a target of both deception and financial injury, a limitation on mail or wire fraud prosecutions sometimes known as the convergence doctrine. *See, e.g. United States v. Lew*, 875 F.2d 219, 221-22 (9th Cir. 1989); *United States v. Shelton*, 848 F.2d 1485, 1495 (10th Cir. 1988), *cert. denied*, 469 U.S. 857 (1984); *Mylan Laboratories, Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1074 (D. Md. 1991); *Lifshultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, 805 F. Supp. 1277, 1294 (D.S.C. 1992), *aff'd on other grounds*, 998 F.2d 1009 (4th Cir.), *cert. denied*, 510 U.S. 993 (1993).

The Sixth Circuit has recently noted that a split of circuit authority exists on this issue. *United States v. Frost*, 125 F.3d 346, 360 (6th Cir. 1997). In addition, the Second Circuit has expressed support for the convergence doctrine. *See, e.g. Corcoran v. American Plan Corp.*, 886 F.2d 16, 20 (2d Cir. 1989); *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988). Indeed, although the panel opinion below denied that the First Circuit had previously adopted the convergence doctrine, the language employed by the First Circuit in *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 794 (1st Cir. 1990), *cert. denied*, 498 U.S. 992 (1990), has been uniformly interpreted by other federal courts as a holding that, for mail fraud purposes, the person deceived must also be the person injured. *See, e.g., United States v. Blumeyer*, 114 F.3d 758, 767 (8th Cir. 1997), *cert. denied*, 516 U.S. 1172 (1996); *United States v. Sawyer*, 85 F.3d 713, 734 n.18 (1st Cir. 1996);

Byer Industries, Inc. v. Gulf Ins. Co., 888 F. Supp. 1, 2 (D.D.C. 1995).

Here, the First Circuit acknowledged in its opinion below that the circuit courts are split on the issue of necessary convergence, App 13a-14a. Indeed, a fair argument could be made that the First Circuit's position on this issue has changed from that of its earlier precedent in *McEvoy Travel*, at least as that case has been widely construed by other courts. *Sawyer*, 85 F.3d at 734 n.18 In the *Blumeyer* opinion, for example, the Eighth Circuit noted that "Whether a defendant may be convicted of mail fraud or wire fraud for making false representations only to a person other than the intended victims of the scheme is a difficult question, and one on which the case law does not admit of easy reconciliation." 114 F.3d at 767.

The facts of this case highlight the typical circumstance under which this issue will arise--a claim that false representations to a government official constitute a scheme to defraud when any economic loss could only be suffered by others, including those for whose economic benefit the government official acts as regulator. In substance, the government's position here is that every regulator, state or federal, has a property right in effective regulation based upon the expectations of the public in such regulation. An almost identical claim by insurance regulators was squarely rejected in *Corcoran v. American Plan Corp.*, 886 F.2d 16 (2d Cir. 1989). In the *Corcoran* case, the New York Superintendent of Insurance claimed that the deceit of insurance regulators by former insurance executives of an insolvent insurance company satisfied *McNally's* requirement of a property right infringement because the policyholders had a property interest in dealing with an effectively regulated insurance company. 886 F.2d at 21. The Second Circuit rejected this contention, concluding that any such right of a policy holder to effective

regulation "is analogous to the 'intangible right of the citizenry to good government' which was repudiated by the Supreme Court in *McNally*." 886 F.2d at 22.

In *McNally*, this Court narrowly construed the mail fraud statute as limited to property rights in part out of a desire to avoid leaving "its outer boundaries ambiguous and involve[ ] the Federal Government in setting standards of disclosure and good government for local and state officials." 483 U.S. at 360. This comity concern is equally present in this context by dint of fact that Congress has expressly left the field of insurance regulation to the States by passage of the McClellan-Ferguson Act, 15 U.S.C. § 1012. The prospect that all disclosures, compelled or otherwise, to state regulatory officials will become the grist for federal mail or wire fraud prosecutions is one that fairly invokes this Court's cautionary note in *McNally* that "[i]f Congress desires to go further [than the protection of property rights], it must speak more clearly than it has." 383 U.S. at 360.

III. A split of circuit authority exists on the availability of an advice of counsel instruction, and this recurring issue warrants the review of this Court.

This Court has squarely held that, "As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). Petitioner Christopher introduced a host of evidence at trial, including formal legal opinion letters, correspondence, and counsel testimony, demonstrating that Christopher's action were undertaken in

reliance upon the advice of counsel.[7] Nonetheless, the District Court refused a request for a jury charge that good faith reliance upon the advice of counsel (App. 36a), and the First Circuit affirmed. In particular, the First Circuit held that such a good faith instruction is never necessary when the trial court gives an instruction that the government must prove that a defendant "knowingly" commits a wire fraud violation. App. 19a.

The issue of whether giving a general mens rea instruction precludes the giving of a requested defense instruction on good faith in a fraud case is one which has sharply divided federal circuit courts,[8] and which has previously prompted dissents from Justices White and Brennan from prior denials of certiorari. *United States v. Gross*, 506 U.S. 965 (1992) (White, J., dissenting); *Green v. United States*, 474 U.S. 925 (1985) (White, J., dissenting with Brennan, J., concurring). Here, the

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[7] The supporting evidence included formal legal opinions of different law firms to the effect that the closings complied with all state regulatory requirements (CC 435, 448), and letters by counsel to the relevant regulatory agencies (CC675), and testimony by corporate counsel that Resolute's actions complied with regulatory requirements. July 10, 1995, at 256, 259-60; CC675, at 2.

[8] *See generally* Jonas, *The Circuit Split Over Instructing the Jury Specifically on the Good Faith Defense: A Consequence of Superlegislation by the Courts or the Standards of Appellate Review*, 46 Syr. L. Rev. 61 (1995) (noting that the "federal courts of appeal are split over a question fundamental to the trial of any criminal fraud prosecution" and urging that "this question is one that the Supreme Court should resolve sooner than later"). *Compare United States v. Camuti*, 78 F.3d 738, 744 (1st Cir. 1996) (no good faith instruction when mens rea instruction given); *United States v. McElroy*, 910 F.2d 1016, 1026 (2d Cir 1990) (same); *United States v. Gross*, 961 F.2d 1097, 1101-03 (3d Cir.) (same), *cert denied*, 506 U.S. 965 (1992) *with United States v. Casperson*, 773 F.2d 216, 223-24 (8th Cir. 1985) (good faith instruction required); *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) (same) (en banc).

specific good faith instruction requested by Petitioner--good faith reliance upon the advice of counsel--is a well recognized good faith defense. *See, e.g, United States v. DeFries*, 129 F.3d 1293, 1308 (D.C. Circuit 1997) (reversing mail fraud conviction for failure to give advice of counsel instruction) (citing cases); *United States v. Walters*, 913 F.2d 388 (7th Cir. 1990) (reversing mail fraud conviction for failure to give an advice of counsel instruction). *See* 1 Devitt & Blackmar, Federal Jury Practice and Instructions, § 19.08 (1992 ed.) The First Circuit's wholesale elimination of this defense charge raises an important issue which has divided the circuits both generally as to good faith instructions, and specifically as to the instruction of good faith reliance upon counsel.

The District Court declined to give an advice of counsel instruction based upon its perception that Christopher had failed to disclose to counsel "his intention to utilize the insurance companies' assets to pay off pre-existing liens." App. 36a. The record, however, reveals abundant evidence that Christopher timely disclosed this intention. Supporting evidence included the formal legal opinions of counsel tendered at closing wherein this intention was acknowledged, (CC 435, at 21), subsequent loan documents drafted by counsel and recorded in land records in which the purpose of the insurance company loans is identified as the payment of these existing loans (CC480, 501, 507, 557), prior correspondence by Christopher to counsel describing this as the purpose of the loans (CC 591), and correspondence amongst counsel themselves and to state regulators describing the structure and purpose of these transactions and how they complied with regulatory requirements. (CC 480, 675). The government, in its presentence report also acknowledged that Christopher informed counsel in advance that this was the intended purpose of the monies which were to disbursed and which would later become the subject of the wire fraud counts. PSI, at 6.

Finally, the defendant introduced the undisputed testimony of corporate counsel that counsel recommended the restructuring of the Windbrook loan based upon Arizona regulatory limits on loans to one borrower,[9] although the government would contend that this transaction was part of Christopher's alleged fraud. Redacted Indictment, ¶ 35.

On appeal, the First Circuit declined to address the substantial record evidence of Christopher's reliance upon the advice of counsel, although it expressed doubt about the likely success of such a defense. App. 19a. Instead, the First Circuit simply held that because the jury was given a proper instruction that a scheme to defraud must be undertaken "knowingly," that this charge adequately covered the defense of good faith reliance upon the advice of counsel. *Id.* In so holding, the First Circuit applied its prior precedent which had held that a general instruction on good faith is unnecessary when a sufficient instruction is given on the government's burden to prove a knowing violation of law. *Id.* (citing *United States v. Camuti*, 78 F.2d 738, 744 (1st Cir. 1996)). By this means, the First Circuit effectively eliminated a defendants' right to an advice of counsel instruction in any case in which the government's general burden on mens rea is charged.

It is well established in other circuits, however, that a defendant is entitled to an advice of counsel instruction as long as he satisfies the prerequisites for such an instruction.[10] *See*,

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[9] July 10, 1995 testimony, at 119-21, 127.

[10] "A defendant is entitled to advice-of-counsel instruction if he discloses evidence showing: (1) he made full disclosure of all material facts to his attorney before receiving the advice at issue; and (2) he relied in good faith on counsel's advice that his course of conduct was legal." *Defries*, 129 F.3d at 1308 (citing *United States v. Linde*, 18 F.3d 353, 356 (6th Cir. 1994)

e.g., *United States v. DeFries*, 129 F.3d 1293, 1308 (D.C. Cir. 1997) (reversing mail fraud conviction for failure to give advice of counsel instruction; citing *United States v. Duncan*, 850 F.2d 1104, 1117 (6th Cir. 1988)); *United States v. Walters*, 913 F.2d 388, 391 (7th Cir. 1990) (same).

A defendant's need for an advice of counsel instruction is especially compelling in a case like this, where a complex business transaction is subject to the overlapping and conflicting requirements of three states in a heavily regulated arena. Given the small army of expert regulatory counsel deployed in this case for the purpose of assuring regulatory compliance, petitioner should have been afforded a jury instruction that these facts support his defense. As Chief Judge Bauer observed in the Seventh Circuit's opinion in *Walters* reversing a mail fraud conviction for failure to give an advice of counsel instruction: "Amid a sea of facts and inferences, instructions are the jury's only compass." *Walters*, 913 F.2d at 392. Accordingly, this Court should grant certiorari to clarify for the lower courts whether a general instruction of defendant's intent will preclude the giving of a defense instruction on the good faith reliance on the advice of counsel.

CONCLUSION

For the foregoing reasons, petitioner asks that the petition for a writ of certiorari to the First Circuit Court of Appeals be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 97-1111

UNITED STATES
Appellee,

v.

CHARLES S. CHRISTOPHER, a/k/a CHRIS CHRISTOPHER
Defendant, Appellant.

APPEAL FROM THE UNTIED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Hon. Francis J. Boyle, *Senior U.S. District Judge*]

Before
Selya, *Circuit Judge*,
Coffin and Campbell, *Senior Circuit Judges*.

Terrance G. Reed with whom *Christopher A. Hostage and Reed & Hostage, P.C.* were on brief for appellant.

Craig N. Moore, Assistant United States Attorney with whom *Seymore Posner*, Acting United States Attorney, *Charles A. Tamuleviz*, Assistant United States Attorney and *Lisa Simotas*, Attorney, Department of Justice were on brief for appellee.

April 27, 1998

CAMPBELL, *Senior Circuit Judge.* Defendant-appellant Charles S. Christopher was convicted after a jury trial in the district court on eleven counts of wire fraud, 18 U.S.C. § 1343, and ten counts of interstate transportation of stolen goods, 18 U.S.C. § 2314. As vice president of Resolute Holding Company ("Resolute"), Christopher orchestrated Resolute's acquisition in 1988 of American Universal Insurance Holding Company ("American") and Diamond Benefits Life Insurance Company ("Diamond"). In acquiring these companies, Christopher used assets of the acquired insurance companies to, among other things, pay part of the agreed purchase price and to clear liens from property put up as collateral in the transaction. In doing so, Christopher violated promises to state insurance regulators that Resolute would not use the acquired companies' assets to pay for their purchase and that pre-existing liens on the collateral would be cleared by the closing. Both companies subsequently went into receivership.

The district court sentenced Christopher to 121 months' imprisonment and ordered restitution of $26.7 million. This appeal followed. Aside from a single error in the calculation of Christopher's restitution, we affirm.

I. Background

Following the judgment of conviction, "we sketch the facts in the light most favorable to the jury verdict, consistent with record support." *United States* v. *Pitrone,* 115 F.3d 1, 3 (1st Cir. 1997).

A. *Resolute's Purchase of American and Diamond*

Pursuant to state laws designed to protect policy holders, Resolute had to seek the approval of insurance regulators in Arizona, California, and Rhode Island before acquiring American and Diamond. (American was a Rhode Island corporation, and Diamond was an Arizona corporation subject

to jurisdiction of both Arizona and California.) In each application, known as a "Form A," Resolute proposed to infuse the target companies with much-needed capital. That capital was to come from business entities controlled by George W. Reeder, Resolute's majority owner, in the form of promissory notes. Three of the notes are relevant here. The first was payable to American for $50 million and was executed by Hilltop Developers ("Hilltop"). Hilltop's sole shareholder was Reeder. Two Hilltop properties known as "Heritage Ranch" and "Indian Palms" served as collateral for this note.

Hilltop and Reeder executed a second note in the amount of $12 million payable to Diamond. That note was secured by "Indian Springs," another property also owned by Hilltop and Reeder.

The third note, this one for $3 million, was also to be given for the acquisition of Diamond. This money came from Mydar Business Group, Inc. ("Mydar"). While all of Mydar's stock was nominally held by Tom Christopher, the defendant Christopher's brother, the defendant himself held a fifty percent "silent" interest in Mydar. The Mydar note was secured by "Big Springs," a property surrounding defendant Christopher's personal residence.

Diamond was to receive further capital from a cash-for-annuities exchange with the Life Assurance Company of Pennsylvania ("LACOP"). Arranged by Christopher and Resolute, this transaction gave Diamond $29.4 million ($18 million at closing) from LACOP in return for Diamond's assumption of $31 million in LACOP's annuity obligations.

B. *Regulatory Approval of the Acquisitions*

At the time of the applications, each of the four properties securing the described promissory notes (Heritage Ranch, Indian Palms, Indian Springs, and Big Springs) were

encumbered by prior liens. Because of these encumbrances and other concerns, insurance regulators in each state were reluctant to approve the purchase.

Faced with regulatory disapproval, Resolute and Christopher provided a number of assurances to the regulators causing them to acquiesce. Christopher and Resolute assured Arizona that all encumbrances on the collateral would be removed by the time of the closing. Resolute's Arizona Form A represented that "it is expected" that at the closing of the purchase of Diamond the liens on the collateral "will be paid in full."

Similarly, Christopher assured Rhode Island insurance regulators through Resolute's attorneys just ten days before the American transaction closed that the collateral "will be free and clear of all liens at the time the property is transferred to [American]." Christopher's attorney testified that every document representing that Resolute would pay off the liens before closing was prepared with information Christopher provided. Rhode Island issued a Conditional Order on May 27, 1988, approving Resolute's purchase of American. That order provided that, although the transaction closed that day, the change of ownership would not be official until Resolute submitted final title insurance policies for Heritage Ranch and Indian Palms "to be effective as of the closing date which indicate [ ] . . . that all . . . mortgages, deeds of trust, and the like have been paid in full and discharged."

On June 7, 1988, California approved the Diamond acquisition subject to Resolute's written commitments that (1) "no part of the purchase price for Diamond Benefits would be obtained from its assets," (2) Resolute would raise Diamond's capital and surplus to $3 million, and (3) for purposes of determining that capital, the $12 million and $3 million notes would be given no value.

C. *Christopher Clears the Collateral Properties' Pre-Existing Liens*

When the acquisition of American closed on May 27, 1988, the pre-existing liens on the four collateral properties were still outstanding. Likewise, when the Diamond acquisition closed on June 14, 1988, the liens on that collateral were still outstanding. So much was undisputed at trial.

On July 25, 1988, well after both the Diamond and American acquisitions closed, Christopher and Resolute attorney Jarrell Ormand sent over $3.3 million "from," as Christopher himself put it, "Resolute, [American], and/or Diamond" to First American Title. As Resolute was a holding company with virtually no cash, the bulk of the $3.3 million came from the acquired insurance companies. Christopher's letter directed First American Title to use the money first to satisfy the pre-existing liens and, second, to issue title insurance policies to Diamond and American pertaining to the collateral properties.

Christopher instructed First American Title parenthetically that these policies were to be back-dated to the closing date. Thus, in one instance, Christopher wrote the title insurer that American was to "receive . . . a CTLA Mortgagee's Title Insurance Policy (dated as of May 27, 1988) in connection with [the collateral properties]." That letter contained no explanation for the back-dating request.

Four days later, Ormand, Resolute's attorney, also wrote First American Title at Christopher's direction to request that the policies be dated back to the date of closing. He stated simply that for Indian Springs (collateral for Diamond), the "policy . . . should be dated as of June 14, 1988," and that for Indian Palms (collateral for Diamond and American), "[i]t should be dated as of May 27, 1988." Christopher then sent Rhode Island regulators what he described as "[o]riginal copies

of title insurance policies dated as of May 27, 1988." Ormand also testified that Christopher told him that "we're going to take $18 million out of Diamond Benefits and pay down the liens on [the collateral properties]."

First American Title forwarded Christopher title policies dated, per his requests, to match the closing dates. First American Title's chief title officer testified at trial that his company back-dated the policies at "the request of the insured and we were willing to be accommodating in this instance." He testified he was unaware of Christopher's purpose in requesting the earlier date.

First American Title's representative also testified that in back-dating the policy, the company was not protecting American and Diamond against any additional risk or providing them with any additional assurances. He believed that First American Title actually reduced its risk by dating the titles as of the closing since the terms of the policy guaranteed the title only as of the period beginning with the execution of the promissory notes and ending with the date on the policies. In any case, while the back-dating might suggest that the insurance companies had obtained a first position on the collateral by the actual date of the closing, that was not the case, as Christopher knew.

D. *Financing the Acquisitions: The Insurance Companies "Loans" and the Purchase of Desert Aire*

Notwithstanding Christopher's representations to regulators that the collateral liens would be paid off by time of the closing, and that assets of the acquired companies would not be used for the purchase, Christopher caused actions to be taken that, the jury could find, violated both representations. After the closing, the insurance companies "loaned" cash to Hilltop and Mydar, the owners of the collateral, which they used to remove the liens on the collateral. Cash belonging to

Diamond was also used to pay Diamond's purchaser. Hilltop and Mydar noted on their books the crediting of "intercorporate credits" in favor of Diamond and American. In due course, both insurance companies went into receivership and became unable, by themselves, to meet their liabilities to policyholders. These transactions are described in greater detail below.

1. *The Hilltop/Windbrook Note*

At Christopher's direction, Diamond loaned $18 million to Hilltop. The loan was secured by Windbrook Country Club, itself then worth $5 million. Christopher arranged for Diamond to obtain this cash by opening a bank account in its name and then having LACOP transfer the purchase money for Diamond's newly acquired annuity obligations into that account. That transfer formed the basis for Count 1 of the indictment.

Christopher directed the distribution of several million dollars before regulators called a halt to the scheme. Two transfers of about $1.9 million each went to pay off Diamond's former owner in satisfaction of a large portion of the agreed purchase price of Diamond (Counts 2, 3 (wire fraud), 12, and 13 (interstate transportation of stolen goods)). According to the prosecution, this flagrantly violated California's prohibition against using Diamond's own assets to pay the purchase price. The next transfer (Counts 4 and 14) of about $440,000 paid off Christopher's personal note on the Big Springs property. Christopher then wired $8.7 million (Counts 6 and 15) to clear the liens on Heritage Ranch, the property securing the $50 million note contributed to American. Three more wires sent $465,000 to Hilltop (Counts 7 and 16), $825,000 to a trust account for Reeder himself (Counts 8 and 17), and $459,000 to Hilltop and a Reeder account (Counts 9 and 18). $5.9 million was used to pay off the liens on Indian Palms, one of two

properties securing the note for American (Counts 10 and 19); this amount exhausted the LACOP funds, so Christopher ordered the transfer of $3 million from American to the new Diamond account.

2. *The Mydar Note*

At Christopher's direction, American loaned $5.4 million to Mydar. Mydar's note was secured by Big Springs, a property worth no more than $330,990. Since Big Springs was already securing the $3 million promissory note from Mydar to Diamond, Christopher simply canceled that note.

Christopher then distributed the proceeds of the $5.4 million "loaned" by American to Mydar as follows: $3.1 million was disbursed to Resolute, which immediately returned it to American. Similarly, $1.46 million was given to Resolute, which then gave it right back to Diamond. Diamond received $440,000 directly, replacing the money Christopher had used to pay off his mortgage. $138,000 (Counts 5 and 20) was used to clear additional liens on Big Springs.

3. *Desert Aire*

Christopher arranged for American to pay $15.1 million for Desert Aire, a property in California with an appraised value of $7.5 million (and title insurance in that amount) and time share notes worth $7.5 million, generating income monthly. However, Christopher's attorney testified at trial that the actual purchase price was initially only $11.75 million and that at Christopher's direction he falsely inflated the purchase price in a letter documenting the transaction. The remaining $3.3 million of the proceeds generated by this falsification went to pay off the liens for Heritage Ranch and Indian Springs (Counts 11 and 21).

In the summer of 1988, just months after the Resolute acquisitions, an audit of Diamond revealed the disbursement of

the LACOP funds. In September, 1988, Resolute terminated Christopher's duties. Diamond went into receivership later in 1988. American spent two weeks in receivership during the fall of 1988, and became irretrievably insolvent by 1991.

II. Discussion

A. *Sufficiency of the Evidence*

On appeal, Christopher contends that there was insufficient evidence to convict him of wire fraud. He attacks each of the three categories of the wire fraud transfers: (1) those used to pay off pre-existing liens on the collateral properties, (2) those that paid for Diamond's purchase price, and (3) those that relate to the wiring of cash to LACOP in exchange for the assumption of LACOP's annuities. Essentially, Christopher argues that his scheme did not violate any promises made to the regulators. We disagree.

1. *Satisfaction of Pre-Existing Liens*

Christopher concedes that, with the exception of the wire transfers for Diamond's purchase price (Counts 2, 3, 12, and 13), the wire transfers paid off pre-existing liens that encumbered the properties pledged as collateral. He disputes that any regulator forbade the payments. He points to a change Rhode Island regulators made from a draft of their conditional order: the initial version required the liens to be cleared "at the time of closing," while the conditional order that actually issued stated that the liens were to be cleared "effective as of the closing date." As for California and Arizona, he denies that any regulator required the satisfaction of pre-existing liens.

Respecting the Rhode Island conditional order, there was ample evidence that Christopher, in the course of correspondence and dealings with regulators, represented that he would see that the liens were cleared before the closing. In light of this evidence, the jury could have found that the

conditional order itself could not reasonably be understood to sanction continuance of the liens for two months after the closing occurred.[1] Hence the language requiring an indication that "as of the closing date . . . all mortgages, deeds of trust and the like have been paid in full and discharged" meant that the encumbrances would be discharged as of the closing date, not of some later date. The lead Rhode Island regulator testified to understanding that the "effective as of" closing language meant that the properties would in fact be lien-free on the date of the closing; the contested language simply allowed Resolute to close the transaction immediately and to send later its documentation that the insurance companies held a first security interest as of the closing. She testified that documentation "had to reflect the conditions as of the date of the closing." The "effective as of" language permitted only later documentation, not a later clearing of the liens.

Such an understanding would accord with the regulators' statutorily-mandated goal of ensuring that the insurance companies were adequately capitalized. *See infra.* All concerned knew that the targeted insurance companies were in need of immediate capital, and it was in this context that Christopher had promised that Resolute - virtually a shell corporation - would see that both companies' surpluses were increased. Without reliable collateral, the promissory notes could not be counted on for this purpose. To allow the liens to

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[1] The relevant portion of the Conditional Order of May 27, 1988, provided that

> This Order will become final upon receipt, review, and written approval of the following documents:
>
> * * *
>
> 2. Final title insurance policies issued by First American Title Insurance Company to be effective as of the closing date which indicates [sic] that . . . all mortgages, deeds of trust and the like have been paid in full and discharged.

remain after closing would leave the companies' capital deficiency, at the very least, unresolved, and opened up the possibility - which in fact occurred - that the liens would be extinguished by use of the acquired companies' already depleted funds. Either option was plainly untenable in light of the regulators' concerns, of which Christopher was well aware. The jury could conclude that Christopher realized that his scheme exceeded the scope of Rhode Island's conditional order, and, indeed, was an obvious subterfuge designed to evade it.

As for California and Arizona, Resolute's attorneys, acting at Christopher's direction, promised that the collateral pledged to Diamond would be lien-free by closing. Christopher relies on the fact that the Arizona and California approval orders contained no express requirement that the liens be cleared prior to closing. The jury could conclude, however, from the communications between Christopher, his attorneys and the regulators that Christopher made representations to this effect which he realized were essential to securing their approvals.

2. *Wires Transmitted for the Purchase of Diamond*

Christopher promised that Resolute would not use Diamond's assets to help pay its purchase price. He now argues that he did not use Diamond assets to purchase Diamond, but simply advanced Diamond's assets to Resolute - in the form of "loans" - in exchange for offsetting credits and a note. Since the government adduced no evidence that Diamond did not in fact receive such a credit, he contends, the convictions based on that purchase must be vacated.

Here, Christopher is simply splitting hairs. The funds that paid for the purchase of Diamond came out of Diamond's LACOP money and contradicted California's express order that no part of the purchase price for Diamond could come from Diamond's assets. To call them "loans" makes no difference.

The later "credits" did not legitimate the transaction, but, the jury reasonably could have found, were merely part of a shell game Christopher devised to hide the nature of the transfers. *See United States* v. *Jimenez-Perez*, 869 F.2d 9, 10 (1st Cir. 1989) ("[The jury] could legitimately have presumed that the fabrication[s] w[ere] all the more proof of [defendant's] guilt.").[2]

3. *Wire Transfer of LACOP Proceeds to Diamond*

Count 1 of the indictment was based on Christopher's deposit in a special account, kept secret from Diamond's directors, of the cash Diamond received in exchange for assuming the LACOP annuities. Christopher argues that this transfer could not be fraudulent because LACOP and Diamond had entered into a contract to transfer the annuities for cash.

The transfer and misuse of the LACOP money was an indispensable part of Christopher's fraudulent scheme. He could not have obtained that money without having made misrepresentations to state regulators that induced them to approve Resolute's acquisition of Diamond, including promises that none of Diamond's assets would be used to pay its purchase price and that the LACOP funds would be invested in

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[2] Christopher claims that the court erred in imposing a one-level upward departure to his sentence based on his violations of regulatory orders including the Rhode Island conditional order. *See* USSG § 2F1.1 (b) (3) (B) (allowing sentencing court to depart upward based on "violation of any judicial or administrative order"). We think there is adequate evidence that regulatory orders as well as less formalized promises were violated. Christopher's argument that this guideline applies only to recidivists is unfounded. *See United States* v. *Shadduck*, 112 F.3d 523, 530 (1st Cir. 1997) (reading guideline as permitting departure for any violation of order or decree imposed pursuant to "formal proceedings"); *United States* v. *Newman*, 49 F.3d 1, 9-10 (1st Cir. 1995) (affirming enhancement based on defendant's violation of consent decree entered into with insurance regulators).

government bonds and other liquid investments. The fraudulent nature of the transfer was highlighted by Christopher's opening of an account for Diamond in which he deposited the $18 million and which he kept secret from Diamond's officers, and from which he improperly distributed the funds. We find ample evidence of Christopher's fraudulent intent with respect to the funds transferred from LACOP.

B. *Deprivation of "Property"*

Christopher challenges the validity of his conviction in light of *McNally* v. *United States*, 483 U.S. 350 (1987). In *McNally*, the Supreme Court reversed a fraud conviction based on a deprivation of state citizens' right to honest government services and held that "§ 1341 [is] limited in scope to the protection of property rights." *Id.* at 360.[3]

According to Christopher, his conviction exceeds the *McNally* limitation. First, he reasons that he did not deprive any state of "property" as the states' regulatory interest in his acquisitions amounted to nothing more than the public's right to honest government services - precisely the result forbidden in *McNally*. Second, Christopher contends that the deception of the state insurance regulators, resulting in increased risk and actual losses of policyholders was at most a form of indirect victimization not prohibited by the wire fraud statute. Christopher says the wire fraud statute requires "convergence" - that is, the scheme must deceive the same person whom it deprives of money or property. This is an issue that has generated a split of authority. *Compare United States* v.

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[3] In the wake of *McNally*, Congress enacted 18 U.S.C. § 1346, which provides that the deprivation of "the intangible right of honest services" may constitute a scheme to defraud. However, as the government and Christopher agree, § 1346 is inapplicable here because its enactment occurred after the wire transfers at issue.

Blumeyer, 114 F.3d 758, 767-68 (8th Cir.) (expressly rejecting convergence doctrine), *cert denied*, 118 S. Ct. 350 (1997), *with United States* v. *Lew*, 875 F.2d 219, 221-22 (9th Cir. 1989). We deal with these arguments in reverse order, turning first to "convergence" and then the question whether "property" is involved.

1. *Convergence*

We reject Christopher's argument that this court has already adopted the convergence theory. Christopher relies for this proposition on *McEvoy Travel Bureau, Inc.* v. *Heritage Travel, Inc.*, 904 F.2d 786 (1st Cir. 1990), and *United States* v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996) Neither case mentions the term "convergence."

In *McEvoy Travel*, a travel agency brought a civil RICO action, *see* 18 U.S.C. § 1964 (c), against a competitor who had won an exclusive contract with a former client of the plaintiff. The complaint alleged predicate mail and wire fraud violations based on the competitor's fraudulent statements to industry regulatory agencies in order to cause them to approve the exclusive contract. *See McEvoy Travel*, 904 F.2d at 788-89. The district court dismissed for failure to state a claim, and we affirmed. Christopher points to our statement that "[w]hile deceiving [the regulators] may have been part of a larger plan having an adverse impact on [plaintiff] McEvoy, this fact did not make McEvoy the object of a mail or wire fraud." *Id.* at 794.

This statement in *McEvoy Travel* was directed not to the scheme-to-defraud element, but rather to the sufficiency of causation. *See id.* at 793 ("There was . . . no casual connection, in the ordinary sense, between the fraudulent submission to the [regulatory agencies] and McEvoy's injury. The latter was caused by [the client] Norton's withholding of its business from McEvoy, not some trick or artifice."). In the

scheme urged by the *McEvoy Travel* plaintiff, the deception actually *followed* the loss. *See id.* When we reasoned that no mail or wire fraud had occurred because "the only parties deceived - [the regulators] - were not deprived of money or property," *id.*, we were simply making the point that the deception must in fact cause the loss.

Christopher also seizes on a footnote from our opinion in *United States* v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996), a prosecution for a scheme to deprive another of the right to honest government services under the revised § 1346. Sawyer was a lobbyist who, in violation of a state statute, gave gifts to state legislators. This court vacated Sawyer's mail fraud convictions based on defective jury instructions. We then rejected the prosecution's alternative theory that Sawyer's deception of his employer (he had hidden the gratuities) was a prohibited scheme to defraud. The footnote relied on by Christopher stated in relevant part:

> Sawyer's deceptive conduct toward [his employer], alone cannot form the basis of this honest services fraud conviction. Rather, the alleged victims of the mail fraud - here, the state and the public - must be the ones deceived. Thus in order for any deception of [the employer] to form a part of the scheme to deprive the Commonwealth and her citizens of legislators' honest services, *some showing that such conduct was connected to the defrauding of alleged victims is required.*

Sawyer, 85 F.3d at 734 n. 18 (citations omitted and emphasis added). As in *McEvoy Travel*, the *Sawyer* panel simply rejected a fraud claim based on misrepresentations that did not cause

relevant harm; neither decision required a convergence theory.[4] We, therefore, reject Christopher's claim that this court has previously adopted the convergence view of the mail and wire fraud statutes.

Turning to whether we should now adopt a convergence theory, we see little reason to do so. Nothing in the mail and wire fraud statutes requires that the party deprived of money or property be the same party who is actually deceived. The phrase "scheme or artifice . . . for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," 18 U.S.C. § 1341, is broad enough to include a wide variety of deceptions intended to deprive another of money or property. *McNally* itself says nothing about convergence. *See United States* v. *Evans*, 844 F.2d 36, 39 (2d Cir. 1988). We see no reason to read into the statutes an invariable requirement that the person deceived be the same person deprived of the money or property by the fraud. If, for example, the role of a government regulator is to protect the monetary interests of others, a scheme to mislead the regulator in order to get at the protected funds will affect "property rights" as required in *McNally*.

2. *Protection of Property Rights*

The deception in the present case did not simply relate to depriving the citizens of California, Arizona and Rhode Island of the honest services of government officials in some abstract sense. The three states' insurance codes each provided

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[4] We recognize that in the same footnote the *Sawyer* panel shorthanded *McEvoy Travel* as "rejecting the position that a scheme to defraud is established if the deception of one party causes deprivation to another." *Sawyer*, 85 F.3d at 734 n. 18. Read in context, we doubt that the *Sawyer* panel meant that *McEvoy Travel* had announced a convergence theory, and are certainly not bound by another panel's passing characterization of an earlier circuit holding.

that its regulators may disapprove an acquisition of an insurance company when "[t]he financial condition of an acquiring person is such as might jeopardize the financial stability or prejudice the interests of its policyholders." Cal. Ins. Code § 1215.2 (d) (3) (West 1998); *see also* Ariz. Rev. Stat. Ann. § 20-481.07 (A) (6) (West 1997) (same); R.I. Gen. Laws § 27-35-2 (d) (1) (iii) (1997) (same). Christopher was accused of intentionally subverting requirements imposed by state insurance regulators designed to protect the financial health of two insurance companies during their purchase by Resolute, Christopher and his associates. By his deceptive representations and by making a deliberate end run around those requirements, Christopher siphoned over $26 million from the coffers of the two companies, diverting to his own purposes funds the regulators sought to protect. Thereafter, both companies became insolvent, threatening or causing actual monetary loss to policyholders and to special funds established under state law to protect policyholders in the event of a companies insolvency. The purpose and result of the fraud plainly related to money. While the true victims were not merely the deceived regulators, the casual connection between the deception and the loss of property is obvious. *See McEvoy Travel* 904 F.2d at 793.[5]

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[5] We note that several other courts have upheld wire fraud convictions based on very similar facts. *See United States v. Cooper*, 132 F.3d 1400, 1404 (11th Cir. 1998) (upholding conviction based on deception of insurance regulators that harmed policyholders); *Blumeyer*, 114 F.3d at 767-68 (affirming conviction based on misrepresentations made to insurance regulators that allowed victimization of others); *United States* v. *Cosentino*, 869 F.2d 301, 307 (7th Cir. 1989) ("[I]n misleading the Department of Insurance, the scheme permitted the agency to remain in business past the point it would have had the Department been aware of the defendants' activities - and that additional time allowed the defendants more time to take [the victims'] money.").

The prosecution's theory of the case was as just stated. The indictment charged that false statements to the insurance regulators first enabled Christopher and his associates to arrange for the siphoning of Diamond's and American's assets, and that they then further concealed the wrongdoing. Both American and Diamond went into receivership. Given that Christopher arranged for each company to get far less than he promised from the acquisition, the jury could reasonably have concluded that the scheme was designed to deprive and did in fact deprive the insurance companies of property, placing the policyholders in ultimate jeopardy. In instructing the jury, the district court first reiterated the scheme as charged in the indictment, then explained that a "scheme or artiface to defraud is an intentional course of conduct which is done for the purpose of depriving a person or corporation of some possession, right, or interest by means of false or fraudulent pretenses, representations, promises, or other deceptive conduct." Based on the indictment and instructions, the jury could not have convicted Christopher had it not found that his fraudulent representations were a means to take money from American and Diamond and to use those funds for improper purposes concealed from the regulators. Such a finding places Christopher's conduct well within the reach of § 1341.

C. *Denial of Jury Instruction Regarding Advice of Counsel*

Christopher requested that the court instruct the jury that good-faith reliance on the advice of counsel is a defense to wire fraud. The district court denied this request on the ground that Christopher had not apprised counsel of his plans to use the insurance companies' funds to satisfy pre-existing liens. In particular, the district court pointed to the fact that Christopher ordered Fleet Bank to disburse the LACOP annuity funds without relying on counsel.

Christopher responds that there was a sufficient predicate in the evidence to require the giving of this instruction. He points to the fact that numerous lawyers were involved at every step of the acquisitions, including the restructuring of the Windbrook and Mydar loans. In letters to both his own attorneys and to Resolute's, Christopher claims to have fully disclosed his intention to use the insurance companies' assets to pay off the pre-existing liens, and to inflate the purchase price of Desert Aire.

We doubt that Christopher made a sufficient showing of good faith reliance on counsel to justify a finding in his favor on that basis. But we need not decide the issue since we have held that "[a] separate instruction on good faith is not required in this circuit where the court adequately instructs on intent to defraud." *United States* v. *Camuti*, 78 F.3d 738, 744 (1st Cir. 1996). The district court told the jury here that conviction required a finding that Christopher "knowingly" participated in a scheme to defraud, and defined "knowingly" to mean an act done "voluntarily and intentionally and not because of mistake or accident or other innocent reason." Moreover, the court instructed the jury that Christopher was guilty only if he "knew he was violating the law." Similar instructions were given on the counts for interstate transportation of stolen goods. Because the district court's instructions "sufficiently convey[ed] the defendant's theory," *United States* v. *DeStefano*, 59 F.3d 1, 2-3 (1st Cir. 1995) (citation omitted), the refusal to give a reliance-of-counsel instruction was not error.

D. *Requested Jury Instruction on Limited Use of Evidence of Administrative Violations*

Christopher requested an instruction that would have told the jury that (1) a violation of an

administrative order did not compel the conclusion that defendant had committed the charged offense and (2) any

evidence of such a violation goes only to the defendant's intent to commit the crime. The court gave the first half of this instruction, charging the jury that "violation of an insurance regulatory order is not itself a crime," but not the second part, instead telling the jury that it "may consider all evidence or lack of evidence of such a violation in determining whether the Defendant committed the offenses charged in the indictment." This instruction, Christopher argues, permitted the jury to apply the evidence of the regulatory violations directly to the actus reus of the offense.

Taking the instructions as a whole, as they must be taken, *see United States* v. *Arcadipane*, 41 F.3d 1, 8 (1st Cir. 1994), they did not encourage the jury simply to equate a violation of the regulatory orders with the commission of wire fraud. That much was evident based on the instruction that "[t]he violation of an insurance regulatory order is not itself a crime." Wire fraud was described as the "transmission of a wire communication in interstate commerce in furtherance of a scheme to defraud." A rational jury could scarcely have applied the evidence of regulatory violations to elements other than whether Christopher knowingly participated in a scheme to defraud and whether he did so with a specific intent to defraud.

E. *Sentencing and Restitution*

Using the 1988 Sentencing Guidelines, the district court sentenced Christopher to 121 months' imprisonment and ordered him to pay restitution of $26.7 million. The district court increased the base offense level of six, *see* U.S.S.G. § 2F1.1 (1988), on several grounds: eleven levels because Christopher caused a loss of over $5 million; five additional levels for the total loss of $26.7 million; two levels for Christopher's causing Diamond to become insolvent; one level

for a violation of regulatory orders; and one level for causing a lack of investor confidence in Diamond and American.

Christopher attacks his sentencing on several fronts. We consider each in turn.

1. *Calculation of Loss*

The district court calculated a total loss of $26.7 million by totaling up the monies Christopher siphoned from Diamond and American in payment of the companies' purchase price and to clear liens on collateral for the notes. These consisted of the so-called Windbrook/Hilltop "loan" proceeds ($18 million), the Mydar "loan" ($5.4 million) and the overpayment for Desert Aire ($3.3 million).

Christopher argues that the trial court erred in failing to undertake any actual loss computation, in light of evidence showing offsetting economic value to Diamond and American, especially the remaining value of the collateral. Under the "economic reality approach" adopted by other courts, *see United States* v. *Kopp*, 951 F.2d 521, 531 (3d Cir. 1991), Christopher contends, the loss calculation must be based on the net economic loss caused or intended by the defendant. He also places some weight on Application Note 7(b) to § 2F1.1 (providing that "[i]n fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim").

The short answer to this argument is that these sums that Christopher caused to be siphoned from American and Diamond were actual "net" losses, not merely gross losses. Had the deal proceeded as the regulators anticipated, and as Christopher represented, these large amounts of cash would not have been diverted from the two companies while, at the same time, the Reeder and Mydar notes to the companies would have been secured by encumbrance-free collateral, the encumbrances

having been cleared by outside funds prior to the closings. Christopher and Resolute promised to deliver to the companies the capital embodied in the promissory notes, backed by lien-free collateral. While the companies eventually gained the senior security interest in the collateral, they did so only after paying from their own depleted funds the $26.7 million which, were it not for Christopher's fraud, they would have kept. To reduce the loss by the value of the foreclosed collateral, as Christopher urges, would double count: the insurance companies were entitled to the protection of lien-free collateral without having to reduce their own capital in order to pay off the liens. The actual loss was, therefore, the $26.7 million taken from the companies.

Christopher argues that the district court erred in blaming him for the full $26.7 million loss and in not taking into account other causes of the financial harm to American and Diamond.[6] The loss figures in the Guidelines are based on the assumption that "the defendant alone is responsible for the entire amount of the victim loss." *United States* v. *Gregorio*, 956 F.2d 341, 347 (1st Cir. 1992). Christopher points to evidence presented at trial of two other causes for Diamond's and American's losses: (1) their poor insurance practices before and after his short tenure, and (2) the role of Wayne Reeder, Resolute's majority owner, who owned the properties that served as collateral for the acquisitions (and which were encumbered by liens of over $21 million), as compared with the $548,000 of lien obligations on Mydar-related (and Christopher-owned) properties.

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[6] We note that Christopher is not arguing that others' responsibility for the entire amount of victim loss required the district court to depart downward. *See United States* v. *Shattuck*, 961 F.2d 1012, 1016-17 (1st Cir. 1989).

The district court's decision not to reduce the loss amount in light of these other factors was not an abuse of discretion. That Christopher diverted $26.7 million from the two insurance companies was not attributable to the companies' insurance practices. And Reeder's pre-existing liens were not an independent cause of the losses. At most they were an incentive for the theft. Christopher himself took the lead in moving the scheme along every step toward completion. Because the losses would not have occurred without Christopher's actions, the court was not required to consider other causes in calculating the loss.

2. *Calculation of Restitution*

Under the version of the statute applicable to Christopher's case, "the court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation." 18 U.S.C. § 3663 (e) (1) (1988) (repealed 1996). Christopher points out several aspects of his scheme that resulted in the insurance companies' receiving some remuneration. One error below is stipulated: the government agrees with Christopher that restitution of the entire $5.4 million of the Mydar loan is inappropriate because the only counts in the indictment relating to that loan (Counts 5 (wire fraud) and 20 (interstate transportation of stolen property)) involved a wire transfer of only $138,000. Thus, restitution should have been at most $21,438,000 rather than $26,600,000 as ordered below. Although Christopher failed to make this argument below, the government concedes that it is plain error to impose restitution based on losses for which the defendant was not charged in the indictment. *See United States* v. *Gilberg*, 75 F.3d 15, 20-22 (1st Cir. 1996).

Otherwise, the calculation of restitution was correct. Christopher claims that the district court should have reduced the total by the amount of income that American has received

from Desert Aire, or ignored the Desert Aire purchase altogether since the value of the property and time share notes equals the amount American actually paid. This, however, ignores the simple fact that American was $3.3 million the worse for his inflation of the Desert Aire purchase price. Had he been honest, American would have received an identical return from the property and given up $3.3 million less in the process.

Similarly, Christopher points to the fact that, as part of a post-receivership settlement with American, Diamond was scheduled to receive title to the Heritage Ranch collateral. Again, Christopher attempts to get extra credit for providing Diamond with what rightfully belonged to it. *See* § E.1, *supra.* For the reasons already described, we reject Christopher's claim.

3. *Upward Departure Based on Christopher's Causing the Insurance Companies To Become Insolvent*

Finally, Christopher attacks as clearly erroneous the district court's finding that Christopher caused Diamond's insolvency. Christopher notes that, prior to its acquisition by Resolute, Diamond had a negative net worth. Moreover, in its "version of the offense" included in the PSI, the government conceded that without additional capital, Diamond would be insolvent. Absent the monies provided by the Hilltop and Mydar loans, Christopher argues, Diamond would have continued to be insolvent.

However, Diamond's receiver testified at sentencing that the loss of the $18 million left Diamond insolvent. Although the receiver also testified that Diamond was "struggling" with its cash flow during the summer of 1988, it remained, in his view, "viable" until it was deprived of the $18 million. The fact that Diamond would have been insolvent without an infusion of cash is precisely the point: the regulators would

never have approved the acquisition were it not for Resolute's promises to put money into the company. Instead, Christopher caused Diamond to assume $30 million in new annuity obligations from LACOP and took the purchase price to pay for obligations that he had caused Diamond to assume. Christopher's position ignores what a responsible officer would have done with the LACOP annuity funds: use them to improve Diamond's already precarious financial position. Instead, Christopher used the money to secure Resolute's control of Diamond, at a large net loss to Diamond. The $18 million was greater than the $15 million California regulators thought necessary to revitalize the company, so Christopher's dissipation of those funds can reasonably be viewed as a but-for cause of Diamond's insolvency. Thus, the district court made a choice among supportable alternatives, and that choice was not clearly erroneous.

III. Conclusion

We *modify* the restitution order consistent with this opinion. Subject to that modification, the convictions and sentences are otherwise affirmed.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES IN THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
vs.	:	CR. No. 93-041B
	:	
CHARLES S. CHRISTOPHER	:	
a/k/a CHRIS CHRISTOPHER	:	

MEMORANDUM

On July 20, 1995, a jury convicted the defendant of eleven (11 counts of wire fraud, pursuant to 18 U.S.C. § 1343 (West 1994 & Supp. 1996), and ten (10) counts of interstate transportation of stolen goods, pursuant to 18 U.S.C. § 2314 (West 1994 & Supp. 1996). The conviction arose out of the defendant's role in the purchase of two insurance companies. Specifically, the defendant was convicted of transferring funds by wire in June and July of 1988. These same wire transfers constitute the interstate transfer of stolen goods counts because the monies transferred were obtained by fraud.

Under Rule 33 of the Federal Rules of Criminal Procedure, the Defendant has moved for a new trial based on the following arguments: (1) there was insufficient evidence to establish the crime of wire fraud; (2) there was sufficient evidence introduced to warrant giving jury instructions concerning advice of counsel; (3) the evidence adduced at trial was insufficient to prove the crime of interstate transportation of stolen goods and; (4) the defendant should have been able to more fully cross-examine one of the government's witnesses at

trial. The record and the case law does not support the defendant's contentions, and thus, his Motion is denied. . . .

* * * *

Both the mail and fraud statutes was initially intended to criminalize schemes that deprived the fraud victims of property or other items of economic value. *Id.* Consequently, the defendant argues that deception of state regulators is not a sufficient basis for wire fraud according to Supreme Court precedent. To adequately address the defendant's assertion, the Court must consider two questions: (1) does fraud perpetrated upon a regulatory body constitute the deprivation of a governmental property interest and; (2) assuming that there is a deprivation of a property interest, is it relevant that the party defrauded (the regulators) and the parties harmed (the insurance companies and the individual policy holders) may be different parties?

First, the issue of what constitutes a governmental property interest in light of recent Supreme Court precedent will be considered.

1. Supreme Court Case Law

In *McNally v. United States*, 483 U.S. 350 (1986) a former public official of Kentucky and a private individual were charged with violating the federal mail fraud statute, 18 U.S.C. § 1341.[3]

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[3] The Supreme Court acknowledged that the mail and wire fraud statutes share the same relevant language so the same analysis applies for either statute. *Carpenter v. United States*, 484 U.S. 19, 25 fn. 6 (1987); *see also United States v. Boots*, 80 F.3d 580, 586 n.11 (1st Cir. 1996).

The petitioners devised a scheme whereby they alone choose which insurance groups would get the state's business and in return these insurance companies would share the resulting commissions with the petitioners. The prosecutors' case alleged that the petitioner's self-dealing patronage defrauded the citizens and the government of Kentucky of certain "intangible rights" which included the right to have government business conducted honestly. *Id.* at 352.

The Supreme Court examined closely the text of the mail fraud statute and held that the two phrases work in conjunction with each other such that "to defraud" is to obtain "money or property by fraudulent pretenses." *Id.* at 358. The Court concluded that, '[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.* at 356. Accordingly, the Court reversed the lower courts findings of guilt because there was no concrete injury to property rights, i.e., the commissions received by the petitioners were not the Commonwealth's money. *Id.* at 360.

The *McNally* opinion reigned in the scope of conduct which could be prosecuted under the mail/wire fraud statue.[4] The following year the Supreme Court considered further what

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[4] In response to the *McNally* decision, Congress enacted 18 U.S.C. § 1346 (effective November 18, 1988), which provides that a scheme to deprive another of "the intangible right of honest services" may be considered a scheme to defraud and a violation of the mail fraud statute. *See generally*, Sawyer, slip op. at 13. However, *McNally* is the applicable standard for the instant analysis because the disputed conduct occurred prior to the enactment of § 1346. *See McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (1st Cir. 1990).

constitutes property rights in a scheme to defraud. In *Carpenter v. United States*, 484 U.S. 19 (1987), the scheme involved a reporter at *The Wall Street Journal* who wrote an influential, weekly column discussing stock developments. The reporter agreed to release the column's information to certain stock brokers before publication. The brokers bought and sold stock according to this insider information and then shared the profits with the reporter. *Id.* at 23. A connection was made between the articles' content and the stock brokers' trading, then an investigation occurred which culminated in an indictment and bench trial. *Id.*

Both lower courts found that the reporter committed mail and wire fraud when he appropriated confidential prepublication information gathered in the course of his employment. *Id.* at 24. Before the Supreme Court, the petitioners argued that they did not receive money or property from the *Journal*, a requisite element of wire or mail fraud according to the decision in *McNally*. *Id.* at 24. The Court resolutely replied that confidential business information is a property right and the deprivation of exclusive use to that information is a loss to the newspaper. *Id.* at 26. In essence, the petitioner embezzled from the paper and that misconduct can be characterized as a type of fraud. *Id.* at 27.

In light of these two cases, in order to find a party guilty of wire fraud, the defendant must be accused of taking property of value, tangible or intangible, by means of false pretenses, misrepresentations, or promises. Recent First Circuit case law provides further examples of what is governmental property.

2. First Circuit Case Law Defining Governmental Property

The most relevant case defining property for purposes of mail/wire fraud is *United States v. Bucuvalis*, 970 F.2d 937 (1st Cir. 1992), *cert. denied*, 507 U.S. 959 (1993). In that case the

government prosecuted a group of defendants who owned a variety of establishments in downtown Boston that required alcohol beverage and entertainment licenses. Massachusetts law demands that proprietors apply for licences by submitting applications to municipal licensing boards. These applications asked for disclosure of owners and their backgrounds. The defendants defied these requirements and invented straw men and sham corporations on the applications. *Id.* at 939. The municipal boards were unaware of these misrepresentations and issued licenses to seemingly legitimate owners and operators of the establishments. *Id.*

Drawing upon the Supreme Court's more expansive interpretation of property rights contained in *Carpenter*, the First Circuit held that *McNally* does not preclude convictions of mail fraud dealing with licenses and permits. *Id.* at 945. In doing so, the First Circuit follows the Seventh and the Third circuits. *See Borre v. United States*, 940 F.2d 215, 222 (7th Cir. 1991); *United States v. Martinez*, 905 F.2d 709, 715 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1017 (1990). The First Circuit emphasized that the *McNally* decision simply rejected the narrow principle that an intangible right to honest government is not the type of property contemplated by the statute. The First Circuit concludes that, "[i]n the broadest sense, a 'property' interest resides in the holder of any of the elements comprising the 'bundle of rights' essential to the use or disposition of tangible property or to the exercise or alienation of an intangible right." *Bucuvalis* 970 F.2d at 945.

The facts at bar mirror the *Bucuvalis* definition of property interests. Arizona, California and Rhode Island insurance regulators held an interest, i.e. formal state approval of a sale, that was essential to the use and/or disposition of tangible property, the insurance companies. Therefore, when the defendant made misrepresentations regarding the presence of

liens on the security presented, and the regulators granted their approval, the Government was defrauded of a property interest.

The defendant relies heavily on an earlier, First Circuit decision in which the Court deferred finding a property interest in regulatory approval. *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786 (1st Cir. 1990), *cert. denied*, 498 U.S. 992 (1990). In that action, the plaintiff and one of the defendants entered into a long term contract in which the plaintiff was to be the exclusive travel agent for the defendant. Three years later, the defendant solicited requests from other travel agents to serve as the company's exclusive agent. The plaintiff sued and prevailed in state court on a breach of contract claim. The plaintiff then filed a complaint in federal court claiming violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961-168, predicated upon alleged mail and wire fraud perpetrated by the new travel provider and the defendant.

The plaintiff alleged that an element of this fraudulent scheme was a phoney contract submitted to regulators, the Air Traffic Conference ("ATC") and the International Air Transportation Association ("IATA"). The plaintiff further argued that this deception prompted the required regulatory approval and paved the way for the defendants to create a new travel contract.

The First Circuit declined to find that the defendant's actions constituted mail and wire fraud. The pivotal issue was not whether the regulatory approval was a governmental property interest; rather, the deciding issue was that the party defrauded was not the entity harmed, and the fraud had little to do with the apparent injury. "By securing the regulatory associations' approval by devious means (thus permitting Heritage to serve Norton) did not mislead, trick or deceive McEvoy so as to defraud it." *Id.* at 793. Whatever injury the

plaintiff did sustain from this deal gone sour, it was not due to fraud perpetrated on the regulators, but rather, was due to the fact that an exclusive business contract was breached.

Later, the First Circuit explicitly acknowledged in *Bucuvalis* that 'the property issue was collateral to the disposition of the [*McEvoy*] case." *Bucuvalis*, 970 F.2d at 944 n.13. Therefore, when the *McEvoy* decision is examined with the more recent *Bucuvalis* opinion, it becomes evident that Defendant's reliance on *McEvoy* is misplaced.

U.S. v. Bucuvalis provides the proper analysis under which to determine the pending motion. The First Circuit has held that McNally does not prevent finding a governmental property interest in a permit or license. Regulatory approval is of the same vein and thus, should also be treated as a property right. The First Circuit explained that a city retains a continuous right to control the alienation of licenses. *Bucuvalis*, 970 F.2d at 945. Therefore, when the permits were obtained fraudulently, the City of Boston was deprived its right to control the issuance of licenses. Similarly, after even after the completion of an acquisition, the regulators retain continuing control over the operation of an insurance company. *See* R.I. Gen. Laws §§ 27-1-1 - 27-54-10 (Michie 1994 & Supp. 1995). So like the City of Boston, the insurance regulators were deprived of their right to effectively control the granting of approval and subsequent supervision.

3. Circuit Case Law about the Convergence of Fraud and Injury

The defendant proposes that the wire fraud claim cannot succeed unless the deceived party is the same party suffering from deprivation of a property interest. To support this contention, Defendant mistakenly relies upon a Second Circuit case, *Corcoran v. American Plan Corp.*, 886 F.2d 16 (2d Cir. 1989) which articulates this 'convergence' theory. While the

outcome in *Corcoran*is decidedly in favor of Defendant's position, the Second Circuit explicitly states that the decision does not turn on the convergence theory. *Id.* at 20 ("we find it unnecessary to answer the general question whether the mail fraud statute requires that the party deceived also be the party injured").

Again, the *Bucuvalis* case controls the question of whether mail/wire fraud may be alleged when the party defrauded is not necessarily the same body injured. In *Bucuvalis* the First Circuit affirmed a mail fraud conviction when the parties defrauded were the municipal licensing boards and the court did not require specification as to who exactly was injured as a result of the fraud. Thus, there appears to be no 'convergence' doctrine firmly established in the First Circuit.

The underlying question is whether a licensing board, or in this case a state regulator, may claim fraud when there is no apparent monetary injury to the board per se. However, to deny these governmental bodies standing would thwart their purposes. Both a licensing board and a state insurance regulator act to protect the public. Arguably, the license board protects that sector of the public who frequent entertainment establishment and rely upon the board to ensure that the distribution of liquor licenses is controlled. Similarly, the state insurance regulators protect the sector of the public who are insurance policy holders and investors. The regulators ensure that insurance companies have the means to satisfy claims. When the regulators monitor acquisitions and mergers of insurance companies, they are acting in the public interest. Likewise, when an insurance regulator is deceived, the public is effectively deprived of its right to that expected protection.

When fraud is perpetrated on a state insurance regulator, the public is put at risk. If a risky or imprudent deal is approved because of fraudulent representations, there is a

chance that policy holders will be unable to receive the their entitled benefits.[5] Thus, in this case, the policy-holders of AU and Diamond were jeopardized when Resolute acquired those companies with security that was heavily encumbered. In addition, Resolute further harmed policy holders when the defendant utilized Diamond's assets to pay these encumbrances rather than using the money to pay necessary claims.

In an action similar to the one at bar, the Seventh Circuit accurately portrays how fraud perpetrated on state insurance regulators operates to harm several parties. *United States v. Cosentino*, 869 F.2d 301 (7th Cir. 1989), *cert. denied*, 492 U.S. 908 (1989). The facts were that the defendants owned an insurance company and severely misled state regulators regarding the company's imminent insolvency and dwindling surplus. *Id.* At 303-304.

The court held that the defendant's scheme deprived the insurance company, the policy-holders and claimants of their right to honest performance of duties and deprived the company of sound financial management. Moreover, the defendant's conduct permitted the company to exist longer than it would have had the regulators known of the company's true status; this was more time for the defendants to improperly utilize the

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[5] The regulators are also safeguarding the public because when insurance companies fail, an insurance solvency fund pays out to policy-holders left bereft of coverage. See R.I. Gen. Laws §§27-34-1 - 27-34-19, Rhode Island Insurers' Insolvency Fund (Michie 1994). The fund is created by the contribution of all insurance companies operating in Rhode Island. When insurance companies participate in that fund it translates into higher premiums for individuals. Therefore, the insurance-holding public has an interest in maintaining a climate in which the fund is rarely necessary.

insurance company's surplus. *Id.* at 307. The Court admonished, "[a]t issue here are the financial assets of the alleged victims, not the nebulous rights to have business conducted honestly." *Id.* Similarly, in the action at bar, fraud perpetrated against the three state insurance regulators gave the defendant an opportunity to profit at the expense of the insurance company, its policy-holders, potential claimants and ultimately, the public.

The jury found sufficient evidence to find Mr. Christopher guilty of wire fraud. There is no reason to disturb the jury's finding. In applying the First Circuit's latest word in *Bucuvalis*, this Court is satisfied that the state insurance regulators' approval constituted a governmental property interest which was defrauded by the defendant.

C. The Advice of Counsel Jury Request

Another ground for a new trial propounded by the defendant is the argument that the court made a fatal flaw by denying the defendant's request for a jury instruction regarding the defense of reliance on advice of counsel. The defendant contends that at all times the transactions were complex and thus, Defendant relied upon counsel for Resolute (Mr. Ormand) and counsel for the various Reeder entities (Mr. Karma).

1. The Legal Standard

In order to establish an advice of counsel defense, the defendant had to establish that:

> (1) before taking action, (2) he in good faith sought the advice of an attorney who he considered competent, (3) for the purpose of securing advice of the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5)

> and acted strictly in accordance with the advice of his attorney who had been given a full report.

United States v. Cheek, 3 F.3d 1057, 1061 (7th Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1055 (1994) *quoting, Liss v. United States*, 915 F.2d 287, 291 (7th Cir. 1990). In *Cheek* the Court of Appeals affirmed the district court's decision to prevent an advice of counsel jury instruction because the defendant's conduct did not comport with the legal requirements. For example, the record showed that the defendant engaged in misconduct before contacting counsel. Id. at 1062. In addition, the defendant did not demonstrate that he made a full and accurate report about his action to any attorney. *Id.*

In a Sixth Circuit case, the court again affirmed a district court's denial to provide an advice of counsel jury instruction because the defendant failed to fulfill two criteria: (1) full disclosure to counsel of all pertinent facts, and (2) good faith reliance on counsel's advice. *United States v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994). In *Lindo* the defendant was charged with violating several securities laws, and tried to claim that he undertook stock transactions upon the advice of counsel. The court found no evidence that the defendant provided counsel with the full information regarding the stock sales, and absent that disclosure the defendant could not maintain an argument that he relied in good faith upon his attorney.

2. Application of Law

According to the evidence presented at trial, the defendant never made full disclosure to his counsel. While the record reflects that counsel prepared much of the paperwork, the record does not reflect the assertion that the defendant told counsel of his intention to utilize the insurance companies' assets to pay off pre-existing loans. Moreover the record shows

that the defendant alone instructed Fleet Bank to disburse the money according to his direction, and thereby completed the fraudulent scheme on his own accord and not in good faith reliance on the advice of counsel.

In sum, the defendant did not provide the court with sufficient evidence to support jury instructions explaining the defense of advice of counsel. *See United States v. Oreto*, 37 F.3d 739, 748 (1st Cir. 1994) ("accused entitled to an instruction on his theory of defense as long as it is a valid one and there is evidence in the record to support it"), *cert. denied*, __ U.S. __, 115 S.Ct. 1161 (1995) *quoting*, *United States v. Rodriguez*, 858 F.2d 809 (1st Cir. 1988). . . .

* * * *

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 97-1111

UNITED STATES,
Appellee,

v.

CHARLES S. CHRISTOPHER,
Defendant, Appellant.

BEFORE
Torruella, *Chief Judge*
Coffin, Campbell, Selya, Boudin, Stahl and Lynch,
Circuit Judges

ORDER OF COURT
Entered: June 11, 1998

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion of rehearing en banc be denied.

By the court:
Phoebe Morse, Clerk
By JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Messrs. . Hostage, Reed, Moore, Tamuleviz, DiGioia and Simotas]

APPENDIX D

**IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND**

UNITED STATES OF AMERICA	)	
	)	
vs.	)	CR. NO. 93-41
	)	
CHARLES S. CHRISTOPHER, a/k/a CHRIS CHRISTOPHER	)	

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Respectfully submitted,

Charles S. Christopher
by his attorneys,

William M. Ravkind
8117 Preston Road
Dallas, Texas 75225

Richard A. Gonnella
91 Friendship St.
Providence, RI 02903
Bar #1490

REQUEST NO. 3

GOOD FAITH RELIANCE
ON ADVICE OF COUNSEL

GOOD FAITH IS A COMPLETE DEFENSE TO THE CHARGES IN THE INDICTMENT SINCE GOOD FAITH ON THE PART OF THE DEFENDANT IS INCONSISTENT WITH THE EXISTENCE OF WILLFULNESS WHICH IS AN ESSENTIAL PART OF THE CHARGES. THE BURDEN OF PROOF IS NOT ON THE DEFENDANT TO PROVE HE ACTED IN GOOD FAITH, OF COURSE, SINCE HE HAS NO BURDEN TO PROVE ANYTHING.

A DEFENDANT WOULD NOT BE 'WILLFULLY' DOING WRONG IF, BEFORE TAKING ANY ACTION WITH REGARD TO THE ALLEGED OFFENSE, HE CONSULTED IN GOOD FAITH WITH AN ATTORNEY WHOM HE CONSIDERED COMPETENT, MADE A FULL AND ACCURATE REPORT OF HIS ATTORNEY OF ALL MATERIAL FACTS OF WHICH HE HAD THE MEANS OF KNOWLEDGE, AND THEN ACTED STRICTLY IN ACCORDANCE WITH THE ADVICE GIVEN TO HIM BY HIS ATTORNEY. WHETHER THE DEFENDANT ACTED IN GOOD FAITH FOR THE PURPOSE OF SEEKING ADVICE CONCERNING QUESTIONS ABOUT WHICH HE WAS IN DOUBT, AND WHETHER HE MADE A FULL AND COMPLETE REPORT TO HIS ATTORNEY, AND WHETHER HE ACTED STRICTLY IN ACCORDANCE WITH THE ADVICE HE RECEIVED, ARE ALL QUESTIONS FOR YOU TO DETERMINE.

THEREFORE, IF YOU FIND THAT MR. CHRISTOPHER ACTED IN GOOD FAITH RELIANCE ON THE ADVICE OF HIS ATTORNEYS REGARDING THE

MATTERS THAT ARE BEFORE YOU FOR YOUR CONSIDERATION, THEN YOU MUST RETURN A VERDICT OF NOT GUILTY.

(2)

FILED
NOV 12 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-419

In the Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES SIMPSON CHRISTOPHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

LISA SIMOTAS
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the wire fraud statute requires that a defendant's misrepresentations be made to the same party from whom money or property is obtained.

2. Whether petitioner's scheme to acquire two insurance companies by means of false representations and promises, in order to enable petitioner to loot the companies' assets, constituted a scheme to defraud the companies of money or property within the meaning of *McNally* v. *United States*, 483 U.S. 350 (1987).

3. Whether, in addition to instructing the jury that it must find that petitioner acted knowingly and with specific intent to defraud in order to return a guilty verdict, the district court was required to give petitioner's requested instruction that good-faith reliance on the advice of counsel is a defense to the charges against him.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-419

CHARLES SIMPSON CHRISTOPHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 142 F.3d 46. The memorandum opinion of the district court (Pet. App. 26a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1998. A petition for rehearing was denied on June 11, 1998. Pet. App. 38a. The petition for a writ of certiorari was filed on September 9, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Rhode Island, petitioner was convicted on eleven counts of wire fraud, in violation of

18 U.S.C. 1343 and 2; and ten counts of interstate transportation of stolen goods, in violation of 18 U.S.C. 2314 and 2. The district court sentenced petitioner to a total of 121 months' imprisonment, to be followed by three years' supervised release, and it ordered petitioner to make all reasonable efforts to pay restitution in the amount of $26,700,000. The court of appeals affirmed petitioner's convictions, but modified the restitution order. Pet. App. 1a-25a.

1. The evidence at trial showed that petitioner carried out a fraudulent scheme to acquire two insurance companies—American Universal Insurance Co. (American) and Diamond Benefits Life Insurance Co. (Diamond)—by affirmatively misleading and deceiving state regulators in Rhode Island, Arizona, and California, whose approval was statutorily required for the acquisitions. Petitioner then used approximately $27 million of the companies' monies both to advance his own purposes and then to conceal that misuse of the companies' funds.

a. Petitioner was Vice President of Resolute Holdings, Inc. (Resolute). Resolute had no assets other than $250,000 working capital and was formed solely for the purpose of acquiring insurance companies. In 1987, Resolute sought to acquire American, an insurer headquartered in Rhode Island, and Diamond, an insurer licensed in Arizona and headquartered in California. Gov't C.A. Br. 2. By statute, insurance regulators in each of those States had to approve the acquisitions of the respective companies. *Id.* at 3. Resolute submitted an application, known as a Form A statement, to each State which set out, *inter alia*, Resolute's business plan for the target company and the financial means by which the company would be acquired. Petitioner supplied his attorney with all the information needed to complete the

Forms A, and he personally signed all of the documents submitted to the regulators. *Ibid.*

Petitioner agreed to make much-needed capital contributions to both American and Diamond in the form of promissory notes backed by real estate collateral. For American, petitioner agreed to contribute a $50 million promissory note from Hilltop Developers (Hilltop) secured by Heritage Ranch and Indian Palms, two properties owned by George Reeder.[1] Gov't C.A. Br. 4. For Diamond, petitioner agreed that Hilltop would contribute a $12 million note secured by another Reeder property, Indian Springs. Mydar Business Group, Inc. (Mydar) would also supply a $3 million note to Diamond, which would be secured by a parcel of petitioner's own land known as Big Springs.[2] *Ibid.*

In addition, petitioner arranged for Diamond to receive capital through a transaction with Life Assurance Company of Pennsylvania (LACOP). Gov't C.A. Br. 4. Diamond would receive approximately $29.4 million in cash from LACOP in consideration for assuming approximately $31 million of LACOP's annuity obligations. LACOP would deliver $18 million of the capital at closing, with the remainder to follow several months later. *Ibid.*

At the time Resolute submitted its Forms A, the four properties securing the promissory notes—Heritage Ranch, Indian Palms, Indian Springs, and Big

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[1] George Reeder, a wealthy real estate developer, was the President of Resolute and the sole shareholder of Hilltop. Pet. App. 3a. Reeder was tried separately on similar charges following petitioner's trial.

[2] Mydar was a shell company owned in name by petitioner's brother. The evidence at trial showed, however, that petitioner had a silent 50 percent interest in the company and directed its activities. Gov't C.A. Br. 4.

Springs—were encumbered by liens totaling well over $25 million. Gov't C.A. Br. 5. Petitioner and Resolute repeatedly represented to the insurance regulators in Rhode Island and Arizona that all liens would be fully paid off by the time Resolute closed its acquisitions of American and Diamond. *Id.* at 5-8. The Rhode Island and Arizona regulators testified that those representations were critical to their approval of the transactions. *Id.* at 7. The concerns regarding the liens also led Rhode Island's regulators to give only conditional approval to Resolute's acquisition of American. The order provided that transfer of ownership would not become final until Resolute issued title insurance policies for Heritage Ranch and Indian Palms indicating full payment of all liens effective as of the closing date. *Id.* at 6-7. It was uncontroverted at trial that the extensive liens on Heritage Ranch, Indian Palms, Indian Springs, and Big Springs were not paid off by May 27, 1988, when the American purchase closed, or by June 14, 1988, when the Diamond purchase closed. *Id.* at 8.

California's regulators initially denied approval of Resolute's acquisition of Diamond, objecting specifically to Resolute's proposal to use part of the LACOP capital to pay Diamond's purchase price. Gov't C.A. Br. 8-9. Accordingly, to secure the approval of the California regulators, petitioner agreed in writing that (1) Resolute would not use any of Diamond's own assets to meet the purchase price, and (2) Resolute would provide Diamond with about $1.3 million in cash to raise the company's capital and surplus. *Id.* at 9. California then issued an order that approved the acquisition of Diamond, but that also set forth petitioner's foregoing promises as conditions precedent to such approval. *Ibid.* The testimony at trial demonstrated that those requirements were

material to California's approval of the acquisition. *Id.* at 9-10.

b. After closing on the Diamond and American acquisitions, petitioner proceeded to use the insurance companies' own funds both to pay off the pre-existing liens on the four properties securing the promissory notes and to pay Diamond's purchase price. First, petitioner caused Diamond to "loan" to Hilltop the $18 million it received from LACOP at closing. Reeder's Windbrook Country Club, which was worth only $5 million, was pledged as collateral for the loan. Gov't C.A. Br. 10. Petitioner also had $3 million transferred out of one of American's accounts. *Id.* at 12-13. Using the newly acquired money, petitioner ordered wire transfers in the amount of $3.8 million to pay Diamond's sellers, in direct violation of California's prohibition on using Diamond's own assets for that purpose. *Id.* at 11. Petitioner also ordered wire transfers of $440,000, $8.7 million, and $5.9 million, respectively, to clear liens on Big Springs, Heritage Ranch, and Indian Palms—all in violation of his representations that the liens would be cleared before closing. *Id.* at 11-13. Finally, petitioner ordered wire transfers of $465,000, $825,000, and $459,000 to Hilltop and to accounts controlled by Reeder. *Id.* at 12. Within ten days of the Diamond closing, petitioner had spent all $18 million received from LACOP, and all $3 million transferred out of American's account as well. Petitioner then lied to Arizona regulators, saying that the $18 million was largely intact and that he was looking for ways to invest it. *Id.* at 12-13.

Petitioner next engaged in two more unauthorized, fraudulent uses of the insurance companies' money. First, petitioner caused American to "loan" $5.4 million to Mydar, providing virtually no collateral in return. Gov't C.A. Br. 14-15. Petitioner used part of that money

to clear additional liens on Big Springs and to boost Diamond's capital, as he had promised the California regulators. *Id.* at 15-16. Mydar never repaid any of the American loan. *Id.* at 16. Second, petitioner arranged for American to purchase certain notes and property. Although the purchase price for those assets was $11.75 million, petitioner directed his attorney to prepare documents setting a falsely inflated price of more than $15 million. *Id.* at 16-17. As a result, petitioner gained access to $3.3 million from American, which he used to pay off remaining liens on Heritage Ranch, Indian Palms, and Indian Springs. *Id.* at 17. Once all the liens on the collateral properties were finally cleared, petitioner submitted to the regulators title insurance policies which had been back-dated to the dates of the American and Diamond closings. *Id.* at 18.

2. a. At trial, petitioner argued, *inter alia*, that all of Resolute's actions were undertaken in reliance upon the advice of competent counsel. Pet. 5. Accordingly, petitioner requested a jury instruction that good-faith reliance upon the advice of counsel is a defense to wire fraud. The district court denied petitioner's request on the ground that petitioner failed to show he apprised counsel of his specific plans for the insurance companies' funds. Pet. 15. The district court instructed the jury that to be found guilty of wire fraud, petitioner must have "knowingly devised or knowingly participated in a scheme or artifice to defraud." 7/18/95 Tr. 169. The court explained to the jury that "[a]n act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word 'knowingly' is to insure that no one will be convicted for an act done because of mistake or accident or other innocent reason." *Id.* at

170. The court then instructed the jury regarding specific intent:

> The offense [of] wire fraud requires proof of specific intent before the [petitioner] can be found guilty. Specific intent as the term implies means more than the general intent to commit the act. To establish specific intent the Government must prove beyond a reasonable doubt that the [petitioner] intended to defraud, that is, to deceive for the purpose of causing gain to oneself and loss to another.

Id. at 171. The court also instructed the jury on the knowledge element with respect to the interstate transportation of stolen goods counts:

> Knowledge is an essential element * * *. Thus the Government must prove beyond a reasonable doubt that at the time [petitioner] caused the money or security to be transported in interstate commerce he knew they had been stolen, converted or acquired by fraud. The purpose of adding the requirement of knowledge is to insure that no one will be convicted for an act done because of mistake, accident or other innocent reason. Thus [petitioner's] good faith belief that the money was not stolen, converted or acquired by fraud is a complete defense to these charges.

Id. at 175. The jury found petitioner guilty on all counts. Pet. App. 26a.

b. Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, petitioner moved for a new trial. Petitioner contended, *inter alia*, that his wire fraud convictions were legally erroneous and that sufficient evidence existed to warrant a jury instruction concerning the defense of good-faith reliance on advice of counsel. The district court denied petitioner's motion.

Pet. App. 26a-37a. With respect to petitioner's legal sufficiency challenge, the court found that First Circuit precedent, see *United States* v. *Bucuvalas*, 970 F.2d 937 (1992), cert. denied, 507 U.S. 959 (1993), permitted conviction for wire fraud when a defendant defrauds the government of its right effectively to control the granting of licenses or approvals. Pet. App. 29a-32a. The district court also dismissed petitioner's claim that the deceived party must be the same as the party deprived of a property interest, finding that "there appears to be no 'convergence' doctrine firmly established in the First Circuit." *Id.* at 33a. Finally, the district court held that petitioner was not entitled to a jury instruction on the good-faith defense, finding that "the record does not reflect the assertion that [petitioner] told counsel of his intention to utilize the insurance companies' assets to pay off pre-existing loans." *Id.* at 36a.

3. The court of appeals affirmed. Pet. App. 1a-25a. The court first held that the evidence was sufficient to support petitioner's wire fraud convictions. *Id.* at 9a-13a. It found that petitioner had knowingly violated the promises he made to the insurance regulators both to provide lien-free collateral by the closings and not to use Diamond's own assets to pay its purchase price. The court found that the jury could have concluded that petitioner's conduct "was an obvious subterfuge designed to evade" the regulatory requirements (*id.* at 11a), and it deemed petitioner's innocent explanation for the financial transactions "merely part of a shell game [petitioner] devised to hide the nature of the [monetary] transfers." *Id.* at 12a.

The court of appeals also rejected petitioner's two challenges to the legal sufficiency of his wire fraud convictions. Pet. App. 13a-18a. Petitioner had contended, first, that the wire fraud statute requires

convergence—the fraudulent scheme must deceive the same person who is deprived of money or property. The court held that its previous decisions had not espoused a convergence requirement, and that nothing in the broad language of the mail and wire fraud statutes or in this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), required that limitation. Pet. App. 14a-16a.

The court next rejected petitioner's contention that his deceptive scheme did not deprive the state regulators of property within the meaning of *McNally*, which held that 18 U.S.C. 1341 is "limited in scope to the protection of property rights." Pet. App. 13a (quoting *McNally*, 483 U.S. at 360). The court noted that petitioner "intentionally subvert[ed] requirements imposed by state insurance regulators designed to protect the financial health of two insurance companies," and that "[b]y his deceptive representations * * *, [petitioner] siphoned over $26 million from the coffers of the two companies, diverting to his own purposes funds the regulators sought to protect." *Id.* at 17a. "The purpose and result of the fraud," the court held, "plainly related to money." *Ibid.*

Finally, the court held that the district court did not err in refusing to instruct the jury that good-faith reliance on the advice of counsel is a defense to wire fraud. Pet. App. 18a-19a. The court expressed doubt that petitioner made a sufficient showing to justify a good-faith instruction, but held that a separate instruction was unnecessary in any event because the trial court adequately instructed the jury on intent to defraud. *Id.* at 19a.

ARGUMENT

Petitioner argues (Pet. 8-17) that this Court should grant certiorari to resolve conflicts of authority on three separate issues. Those claims are without merit.

1. Petitioner urges (Pet. 11-13) this Court to grant review to resolve the question whether the mail and wire fraud statutes require that the party deceived also be the party deprived of money or property. Petitioner claims (Pet. 11) that two courts of appeals have adopted such a requirement, which he labels the convergence doctrine. See *United States* v. *Lew*, 875 F.2d 219 (9th Cir. 1989); *United States* v. *Shelton*, 848 F.2d 1485 (10th Cir. 1988) (en banc). Further review of that issue is not warranted.

The court of appeals in this case correctly held, as have several other courts, that the wire fraud statute does not require convergence. Pet. App. 16a; see also *United States* v. *Blumeyer*, 114 F.3d 758, 767-768 (8th Cir.), cert. denied, 118 S. Ct. 350 (1997); *United States* v. *Cosentino*, 869 F.2d 301, 307 (7th Cir.), cert. denied, 492 U.S. 908 (1989).[3] As the court below reasoned, "[n]othing in the mail and wire fraud statutes requires that the party deprived of money or property be the same party who is actually deceived." Pet. App. 16a. The statute requires only that the "scheme or artifice" be "to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1343.

The decisions claimed by petitioner to apply a convergence requirement rely only on this Court's decision

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[3] Because the relevant language in the mail and wire fraud statutes is identical, courts apply the same analysis to each provision. See *Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987); *United States* v. *Sawyer*, 85 F.3d 713, 723 (1st Cir. 1996).

in *McNally* as support. See *Lew*, 875 F.2d at 221; *Shelton*, 848 F.2d at 1495-1496. In *McNally*, this Court reversed mail fraud convictions because the relevant indictment alleged only a fraudulent scheme to deprive Kentucky citizens of their intangible right to honest government, and not a scheme to deprive them of money or property. The Court simply "did not focus on whether the person deceived also had to lose money or property." *United States* v. *Evans*, 844 F.2d 36, 39 (2d Cir. 1988).[4]

Petitioner also errs in contending (Pet. 11) that the decision in this case conflicts with decisions of the Ninth and Tenth Circuits. Despite language in those cases that appears to support a convergence requirement, it is anything but clear that either circuit has in fact adopted such a requirement as a general matter.[5] Both cases can

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[4] The Court did observe that "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property." *McNally*, 483 U.S. at 360. Read in context, that simply reflected the Court's conclusion that the jury instructions erroneously permitted a conviction based only on a finding that the defendants had defrauded the citizens of their intangible right to honest government.

[5] Contrary to petitioner's suggestion (Pet. 11-13), the Second Circuit's holdings in *Corcoran* v. *American Plan Corp.*, 886 F.2d 16, 20 (1989), and *United States* v. *Evans*, 844 F.2d 36, 39 (1988), lend no support to his position. The *Corcoran* court expressly found it "unnecessary to answer the general question whether the mail fraud statute requires that the party deceived also be the party injured." 886 F.2d at 20. Similarly, the court in *Evans* concluded that "the case before us today does not require us to decide this general question [whether the person deceived also has to lose money or property]." 844 F.2d at 40; see also *United States* v. *Eisen*, 974 F.2d 246, 252-253 (2d Cir. 1992) (same), cert. denied, 507 U.S. 998 (1993). The Sixth Circuit has also expressly declined to decide this issue. See *United States* v. *Frost*, 125 F.3d 346, 360 (1997), cert. denied, No. 97-1549 (Oct. 5, 1998).

instead be read only as establishing a causation requirement under the federal fraud statutes.

United States v. *Lew*, 875 F.2d 219 (9th Cir. 1989), involved an attorney who filed false statements with the Department of Labor in order to obtain permanent resident status for his immigrant clients. The government charged that by filing false forms the defendant defrauded his clients of their attorney's fees. The court of appeals reversed because it found no evidence that the defendant had deceived his clients, and the jury was not required to make such a finding. *Id.* at 221. Although the Ninth Circuit opined that this Court's decision in *McNally* required proof of an intent "to obtain money or property from the one who is deceived," *Lew*, 875 F.2d at 221, that statement cannot necessarily be read as a general endorsement of a universal convergence requirement. Rather, the court may only have meant to express in the case's factual context the uncontroversial point—made explicit earlier in its decision—that "mail fraud requires a relationship between the falsity and the collection of the money." *Ibid.* Accordingly, because the false statements made to the Department of Labor did not cause the defendant's clients to part with their money—and because the jury was not required alternatively to find that the defendant deceived his clients directly—the defendant's clients could not have been victims of a "scheme or artifice to defraud."[6]

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[6] Indeed, the First Circuit in this case employed the same reasoning to explain why language in its previous decisions could not be construed as adopting a convergence requirement:

> In the scheme urged by the *McEvoy Travel* plaintiff, the deception actually *followed* the loss. When we reasoned that no mail or wire fraud had occurred because "the only parties

The holding of the Tenth Circuit in *United States* v. *Shelton*, 848 F.2d 1485 (1988) (en banc), is even less clear. In *Shelton*, an elected official received kickbacks from county suppliers and was charged (before *McNally*) with scheming to defraud the citizens of their right to honest government. The indictment also contained allegations suggesting that the county had lost money as a result of the defendant's conduct. See *id.* at 1495. The Tenth Circuit reversed the convictions, however, because the instructions did not require the jury "to find that the victim suffered pecuniary loss"; the instructions defined a scheme to defraud as "a plan to acquire money or property[,] but [did] not require that this money or property come from the victim." *Id.* at 1496 (emphasis omitted). Again, the court may have intended to convey only that the mail fraud statute requires a connection between the fraud and the obtaining of money. The instructions in *Shelton* were faulty because they permitted the jury to convict on the sole ground that the defendant obtained money from suppliers who were themselves perpetrators of the fraudulent scheme. The suppliers' money—the only money received in the scheme—thus could not have been obtained as a result of the deceptive scheme.

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deceived—[the regulators]—were not deprived of money or property," we were simply making the point that the deception must in fact cause the loss.

* * * * *

As in *McEvoy Travel*, the *Sawyer* panel simply rejected a fraud claim based on misrepresentations that did not cause relevant harm; neither decision required a convergence theory.

Pet. App. 14a-16a (citations omitted).

Significantly, the courts in *Lew* and *Shelton*—to the extent they disagreed with the decisions of other circuits—differed only with respect to their reading of this Court's decision in *McNally*. As numerous circuits have now recognized, Congress supplanted the *McNally* decision one year later by enacting 18 U.S.C. 1346, which defines a scheme to defraud to include the deprivation of honest services. See *Frost*, 125 F.3d at 364 (listing cases); *United States* v. *Brumley*, 116 F.3d 728, 732 (5th Cir.) (en banc) (same), cert. denied, 118 S. Ct. 625 (1997). It is questionable whether the Ninth and Tenth Circuits would continue to apply the rules announced in *Lew* and *Shelton* with respect to post-18 U.S.C. 1346 conduct. Moreover, the enactment of Section 1346 significantly decreases the importance of any purported circuit conflict regarding a convergence requirement. As the extremely limited number of recent cases addressing convergence demonstrates, it is the rare case in which a defendant's allegedly fraudulent conduct fails to satisfy the convergence requirement both with respect to money or property and with respect to the broadly defined "intangible right of honest services." 18 U.S.C. 1346.

2. This Court held in *McNally* that the mail fraud statute is "limited in scope to the protection of property rights" and does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government." 483 U.S. at 355, 360. Petitioner argued unsuccessfully below that *McNally* required reversal of his wire fraud convictions.[7] He now contends (Pet. 8-10) that this Court should grant review to resolve a circuit

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[7] Because petitioner's wire fraud scheme was completed before the effective date of 18 U.S.C. 1346, that provision is inapplicable to petitioner's conduct. See Pet. App. 13a n.3.

conflict on the question of whether a government approval or license to conduct a business constitutes property within the meaning of *McNally*. That issue is not squarely presented in this case.

The First Circuit affirmed petitioner's wire fraud convictions because it found that "[t]he purpose and result of [petitioner's] fraud plainly related to money." Pet. App. 17a. It noted that "[b]y his deceptive representations and by making a deliberate end run around" the requirements imposed by the insurance regulators designed to protect the financial health of American and Diamond, petitioner "siphoned over $26 million from the coffers of the two companies, diverting to his own purposes funds the regulators sought to protect." *Ibid.* The court further held that "the jury could reasonably have concluded that the scheme was designed to deprive and did in fact deprive the insurance companies of property, placing the policyholders in ultimate jeopardy," and that, "[b]ased on the indictment and instructions, the jury could not have convicted [petitioner] had it not found that his fraudulent representations were a means to take money from American and Diamond and to use those funds for improper purposes concealed from the regulators." *Id.* at 18a. "Such a finding," the court correctly concluded, "places [petitioner's] conduct well within the reach of § 1341." *Ibid.*

Thus, although the issue was briefed below, the First Circuit's decision does not hold that the insurance regulators' approval of the acquisitions itself constituted a property interest within the meaning of *McNally*. Accordingly, even assuming that a genuine conflict of

authority exists on that question,[8] this would be an inappropriate case in which to resolve it.

3. Finally, petitioner contends (Pet. 13-17) that the district court erred in refusing to give the jury a separate instruction on petitioner's good-faith reliance on advice of counsel, and that this Court should grant review to resolve a split of authority concerning when such an instruction must be given. The court of appeals correctly held that a separate instruction was not required in this case, and further review is unwarranted because petitioner was not entitled to a good-faith instruction under the rule followed in any court of appeals.

A defendant generally is entitled to an instruction on his theory of defense if he makes a timely request for the instruction, the evidence supports the instruction, and the instruction correctly states the law. See *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). But a defendant is not entitled to have the jury instructed in his particular words; it is sufficient if the given instructions adequately and correctly cover the substance of the requested instruction. It is thus well settled that the adequacy of the instructions must be evaluated in the context of the

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[8] As petitioner notes (Pet. 9-10 & nn.5, 6), the Eleventh Circuit recently canvassed the law on this issue and observed that the circuits have reached different conclusions as to whether certain types of business licenses constitute property within the meaning of *McNally*. *United States* v. *Shotts*, 145 F.3d 1289, 1293-1294 (1998). The Eleventh Circuit also observed that most circuits have relied on state law in determining whether a particular type of license constitutes property. *Id.* at 1293-1295. Given that approach, it is "not surprising[]" that the courts of appeals have reached different results. *Id.* at 1294. To the extent, therefore, that any divergent results in the circuits simply reflect the application of different States' laws, there is no genuine conflict of authority that warrants this Court's review.

charge as a whole. See *Estelle* v. *McGuire*, 502 U.S. 62, 72 (1991); *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973).

This case is controlled by *United States* v. *Pomponio*, 429 U.S. 10 (1976) (per curiam). In *Pomponio*, the defendants were charged with willfully filing false income tax returns, in violation of 26 U.S.C. 7206(1). The court of appeals found that the trial court gave "full and complete" instructions that the jury should convict only if it found that the defendants signed their tax returns knowing them to be false, but it nevertheless held that "[s]ince a good faith belief would tend to negate the elements of willfulness and knowledge, [the defendants] were entitled to [such] an instruction." *United States* v. *Pomponio*, 528 F.2d 247, 249, 250 (4th Cir. 1975).

This Court reversed the judgment of the court of appeals. It held that, because the trial judge had "adequately instructed the jury on willfulness[, a]n additional instruction on good faith was unnecessary." *Pomponio*, 429 U.S. at 13; see also *Cheek* v. *United States*, 498 U.S. 192, 201 (1991) (noting the Court's holding in *Pomponio* that "after instructing the jury on willfulness, an additional instruction on good faith was unnecessary") (internal quotation marks omitted).[9] The same conclusion applies here.

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[9] In *Cheek*, this Court held that, in a tax evasion case, it is error to say that "a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue." 498 U.S. at 203. *Cheek*'s holding that a jury should not be instructed that a defendant's belief must be objectively reasonable does not undercut or diminish the holding of *Pomponio* that the standard instructions on knowledge and willfulness are adequate to present the good-faith defense to the jury.

The court of appeals in this case correctly concluded, using reasoning analogous to that in *Pomponio*, that the jury was adequately instructed. On the wire fraud counts, the district court instructed that the jury must find that petitioner knowingly devised or knowingly participated in a scheme to defraud, and that he acted with a specific intent to defraud. 7/18/95 Tr. 169-170. "To establish specific intent," the court instructed, "the Government must prove beyond a reasonable doubt that [petitioner] intended to defraud, that is, to deceive for the purpose of causing gain to oneself and loss to another." *Id.* at 171. The court also instructed the jury that "[a]n act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason." *Id.* at 170. The court then instructed the jury in similar language with respect to the counts charging interstate transportation of stolen goods: "Knowledge is an essential element * * *. Thus the Government must prove beyond a reasonable doubt that at the time [petitioner] caused the money or security to be transported in interstate commerce he knew they had been stolen, converted or acquired by fraud. * * * Thus [petitioner's] good faith belief that the money was not stolen, converted or acquired by fraud is a complete defense to these charges." *Id.* at 175.

The court of appeals correctly found that those instructions sufficiently conveyed petitioner's theory, because the jury could not have returned a guilty verdict on any counts if it had found that petitioner had acted with a good-faith belief in the legality of his conduct. Pet. App. 19a. That holding accords with decisions of the majority of the courts of appeals that have addressed the question. See *United States* v. *Dockray*, 943 F.2d 152, 155 (1st Cir. 1991) (intent to defraud is "essentially the opposite of good faith");

United States v. *McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990); *United States* v. *Gross*, 961 F.2d 1097, 1102-1103 (3d Cir.), cert. denied, 506 U.S. 965 (1992); *United States* v. *Fowler*, 932 F.2d 306, 317 (4th Cir. 1991); *United States* v. *Rochester*, 898 F.2d 971, 979 (5th Cir. 1990) ("[A] finding of specific intent to deceive categorically excludes a finding of good faith."); *United States* v. *Sassak*, 881 F.2d 276, 280 (6th Cir. 1989); *United States* v. *Brimberry*, 961 F.2d 1286, 1291 (7th Cir. 1992); *United States* v. *Sanders*, 834 F.2d 717, 719 (8th Cir. 1987); *United States* v. *Dorotich*, 900 F.2d 192, 194 (9th Cir. 1990) (holding that where court adequately instructs on specific intent in tax fraud case, failure to give additional instruction on good-faith reliance upon expert advice is not reversible error); *United States* v. *Walker*, 26 F.3d 108, 109-110 (11th Cir. 1994) (per curiam); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981).

Petitioner contends (Pet. App. 13-17) that review is warranted because five circuits have held that, even if the jury is instructed on willfulness and specific intent, an additional good-faith instruction is required in cases in which the evidence supports the instruction. No such conflict exists with respect to four of the five circuits named by petitioner. Petitioner points (Pet. 17) to the Sixth Circuit's holding in *United States* v. *Duncan*, 850 F.2d 1104, 1117 (1988), in which the court reversed false tax return convictions because the district court failed to give a good-faith reliance on advice of counsel instruction. The continued validity of that holding as circuit precedent has been put into considerable doubt by the Sixth Circuit's subsequent holding in *United States* v. *Sassak*, 881 F.2d 276 (1989). In *Sassak*, a defendant convicted of aiding and abetting the preparation of false or fraudulent tax returns requested a jury instruction regarding his good-faith defense. The court first found

that the district court's willfulness charge complied with this Court's holding in *Pomponio*. *Sassak*, 881 F.2d at 280. The court then rejected the defendant's claim with respect to the failure to give the requested good-faith instruction, noting that "the *Pomponio* Court found an additional instruction on good faith belief to be unnecessary." *Ibid.*

Petitioner also claims (Pet. 15, 17) that the decision below is in conflict with the Seventh Circuit's decision in *United States* v. *Walters*, 913 F.2d 388, 391 (1990). The *Walters* decision appears to be, at best, an aberration in the law of that circuit. That court's prior decision in *United States* v. *Kelley*, 864 F.2d 569 (7th Cir.), cert. denied, 493 U.S. 811 (1989), held—relying upon this Court's decision in *Pomponio*—that no additional good-faith instruction was necessary there because "instructions on willfulness necessarily encompass[] [the] theory of good faith reliance on counsel's advice." *Id.* at 573. The Seventh Circuit's decision in *Kelley*—and not its decision in *Walters*—has been followed as the law of that circuit. See, *e.g.*, *United States* v. *Mankarious*, 151 F.3d 694, 708 (7th Cir. 1998) (citing *Kelley* and relying on government's argument that "because the offenses involved willfulness, a good faith instruction was unnecessary"); *United States* v. *Cheek*, 3 F.3d 1057, 1062-1063 (7th Cir. 1993) (relying on *Kelley*), cert. denied, 510 U.S. 1112 (1994); *United States* v. *Brimberry*, 961 F.2d 1286, 1291 (7th Cir. 1992) (same).

Petitioner also claims (Pet. 14 n.8) that the Eighth Circuit's decision in *United States* v. *Casperson*, 773 F.2d 216, 223-224 (1985), is in conflict with the decision below. The continued validity of *Casperson* as circuit precedent is questionable in light of that court's subsequent decision in *United States* v. *Sanders*, 834 F.2d 717, 719 (8th Cir. 1987). The court in *Sanders* rejected the

defendant's appeal regarding the district court's failure to give a good-faith instruction because "[it] is sufficient that the jury was given instructions regarding the need to find specific intent to defraud in order to find the defendant guilty of criminal conversion." *Id.* at 719.

Petitioner also claims (Pet. 15, 17) that the decision below is in conflict with the D.C. Circuit's decision in *United States* v. *DeFries*, 129 F.3d 1293, 1308 (1997) (per curiam). The D.C. Circuit is in fact in agreement with the decision below. In a previous case, *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981), that court held clearly that it is unnecessary for a district court to give a good-faith instruction when it has already instructed the jury on the nature of the specific intent required for conviction. The *DeFries* decision did nothing to alter this long-standing rule. The court found the failure to give the good-faith instruction reversible because of the "prosecutor's conduct in closing argument to the jury." *DeFries*, 129 F.3d at 1309. After objecting to a good-faith instruction, the prosecutor informed the jury expressly that the defendant's reliance on his counsel's advice "is not a defense" and also told the jurors that the court would not read any instruction regarding the defendant's reliance on that advice. *Ibid.* The D.C. Circuit, only after "viewing [the jury instructions] in light of the prosecutor's comments," found the failure to give a specific good-faith instruction reversible error. *Id.* at 1309-1310. The court never questioned the validity of its prior decision in *Gambler*.

The one decision which is in conflict with the decision below is that of the Tenth Circuit in *United States* v. *Hopkins*, 744 F.2d 716, 718 (1984) (en banc). The brief opinion fails to discuss—or even note—this Court's decision in *Pomponio*. In light of the trend in the other circuits away from requiring a separate good-faith in-

struction when the jury is already charged on the meaning of specific intent, it is possible that the Tenth Circuit will review its fourteen-year-old decision. In any event, although we believe that *Hopkins* was wrongly decided, there is no need for this Court to grant review, because petitioner did not proffer "evidence sufficient for a reasonable jury to find in his favor," *Mathews*, 485 U.S. at 63, and would therefore not be entitled to a good-faith instruction even under *Hopkins*.

As petitioner himself recognized at trial (see Pet. App. 40a-41a), an advice of counsel instruction is warranted only when there is evidence that:

> (1) before taking action, (2) [the defendant] in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report.

Liss v. *United States*, 915 F.2d 287, 291 (7th Cir. 1990); see 2 Josephine R. Potuto et al., *Federal Criminal Jury Instructions* § 24.08 (2d ed. 1985 & Supp. 1993).

The district court expressly found that the trial evidence failed to support an instruction concerning good-faith reliance on advice of counsel. To the contrary, that court reasoned, the evidence showed only that petitioner's "attorneys were acting in good faith at the direction of the client," rather than the other way around.[10] 7/18/95 Tr. 17. On appeal, the government

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[10] In denying petitioner's motion for a new trial, the district court elaborated as follows:

carefully detailed petitioner's numerous misrepresentations to his attorneys, his failure to make complete disclosure of the relevant facts to any attorney, and his failure to seek legal advice in advance of taking unilateral action. See Gov't C.A. Br. 48-56. Although the court of appeals declined to reach the issue in light of its conclusion that the instructions given were adequate, the court expressed "doubt that [petitioner] made a sufficient showing of good faith reliance on counsel to justify a finding in his favor on that basis." Pet. App. 19a.

Thus, because petitioner would not have been entitled to a good-faith instruction under the rule applied in any court of appeals, the conflict he alleges does not warrant this Court's review.

> According to the evidence presented at trial, [petitioner] never made full disclosure to his counsel. While the record reflects that counsel prepared much of the paperwork, the record does not reflect the assertion that the defendant told counsel of his intention to utilize the insurance companies' assets to pay off pre-existing loans. Moreover the record shows that [petitioner] alone instructed Fleet Bank to disburse the money according to his direction, and thereby completed the fraudulent scheme on his own accord and not in good faith reliance on the advice of counsel.

Pet. App. 36a-37a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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